87-908

No._____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MICHAEL RYAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH (SIB) ABRAHAM, JR.
Attorney for Petitioner
Texas Bar No. 00820009
500 Caples Bldg.
El Paso, Texas 79901
(915) 532-1601

CHARLES LOUIS ROBERTS
Attorney for Petitioner
Texas Bar No. 17000100
The Centre, Suite 306
123 Mills St.
El Paso, Texas 79901
(915) 532-5475

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Whether the good faith exception cannot properly be applied in this case in abrogation of the central principles and operation of our nation's common law system of justice.

Whether the good faith exception cannot properly be applied to bar operation of the exclusionary rule in a case where a litigant was challenging a court-sanctioned practice affecting the constitutional rights of millions of citizens and residents of this country.

Whether the good faith exception is not applicable to the facts of this case.

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No.————

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In The

Supreme Court of the United States

October Term, 1987

—o—

MICHAEL RYAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

—o—

TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THIS CAUSE

—o—

CITATION TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *U.S. v Ryan*, No. 86-1381

was entered without opinion on October 1, 1987 and this Order is reproduced herein as Appendix Item #II. The en banc opinion of the United States Court of Appeals for the Fifth Circuit in *U.S. v Ryan,* No. 86-1381 was entered on August 17, 1981; is yet to be published; and is reproduced herein as Appendix Item #IV. The panel opinion of the United States Court of Appeals for the Fifth Circuit in this case was entered on December 24, 1986, was published as *United States v Jackson and Browning/United States v Ryan,* — F.2d — (5th Cir. 1987); and is reproduced herein as Appendix Item #III. The *Memorandum Order* of the United States District Court for the Western District of Texas, Pecos Division was entered on May 19, 1986; was not published; and is reproduced herein as Appendix Item #I.

———o———

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on October 1, 1987. This petition was timely filed within sixty (60) days of October 1, 1987 pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> *United States Constitution*, Amendment IV

———o———

STATEMENT OF THE CASE

A. The course and proceeding in the District Court:

After having been arrested at the Sierra Blanca checkpoint on February 7, 1986, *RII 3*, Petitioner MICHAEL RYAN was indicted on a single count of "Possessing with intent to distribute more than 1 kilogram of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Defense counsel for Petitioner filed a *Motion to Suppress*, RI 66. Prior to these events, another panel of The Court of Appeals for the Fifth Circuit. in ***United States v Jackson, et al,*** **No. 86-1226, had required that a week long** survey be conducted at the Sierra Blanca checkpoint by the Federal Public Defender's Office for the Western District of Texas, El Paso Division SUP. R. 4. The questions were limited by this Court to the following information: (1) point of origin, and (2) if the point of origin was outside the United States, had the traveler already been stopped

and inspected and questioned at entry or at another checkpoint, SUP. R. 4.

The information provided by this survey produced the first hard data available to any Court, and permission of the Fifth Circuit to conduct the survey was only obtained (as one might expect) over strenuous Government opposition. This new information for the first time presented the true state of affairs existent at the checkpoint. The new information painted the picture of a Border Patrol permanent checkpoint performing inspections, searches, et cetera, which would have been unlawful save at the border and which arbitrarily obstructed and interfered with a steady stream of traffic which was 98.52% domestic in origin and 1.48% international in origin, SUP. R. 12-13.

The new information also revealed that of this 1.48% international traffic, 95.26% of such traffic had already been stopped, questioned, and inspected at a Border Patrol checkpoint and were thus being subjected to a second border inspection at Sierra Blanca. This new information accordingly exposed the fact that only .07% of the traffic passing through Sierra Blanca was actually the sort of traffic that a border checkpoint is supposed to monitor, that is, international traffic not previously inspected. A joint suppression hearing and trial before the bench was held on April 22, 1986, RI 92, which resulted in the *Motion to Suppress* being denied, RI 87, and the Petitioner being convicted, RI 88, RII 38. The District Court had held that the Sierra Blanca checkpoint was no longer the functional equivalent of the United States border, SUP. R. 1 Et Seq, however, the District Court still refused to suppress the evidence gained from the checkpoint search be-

cause the District Court thought that "ample reasonable suspicion" was present, RI 85. The Petitioner was sentenced on May 20, 1986, to ten (10) years imprisonment, RI 88, and from this judgment and sentence the Petitioner filed a timely *Notice of Appeal* on May 29, 1986, RI 89.

B. Proceedings before the Court of Appeals

A panel of U.S. Court of Appeals for the Fifth Circuit affirmed the conviction of the Petitioner holding essentially that under the circumstances neither the District Court below nor the Petitioner had the authority to relitigate the issue of the functional equivalency of the border status of the Sierra Blanca check and that the panel could not reverse the prior holding absent en banc consideration. *United States v Ryan,* No. 86-1381 (5th Cir. December 24, 1986).

On rehearing, the Court of Appeals sitting *en banc* held that:

> Adhering to our prior decisions, a panel of this court upheld the appellants' convictions, and approved the searches at Sierra Blanca on the ground that this checkpoint is the "functional equivalent of the border." The en banc court now decides that the Sierra Blanca checkpoint should not have been regarded as a border equivalent. We further hold that the pleanary searches presently conducted at the Sierra Blanca checkpoint are unreasonable under the Fourth Amendment.
>
> *U.S. v Ryan,* No. 86-1381, Slip Opinion (August 17, 1987) at p. 2

However, the Court also held:

> Appellants urge this court to apply the exclusionary rule and suppress the evidence discovered during the searches we now deem illegal. *Weeks v United*

States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Mapp v Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 619-20, 38 L.Ed.2d 561 (1974). In *United States v Leon*, 468 U.S. 897, 920-21, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677 (1984), however, the Court declined to apply the exclusionary rule to cases where an officer, acting in "objective good faith," had relied on a search warrant. Under such circumstances, the Court reasoned, the exclusionary rule would not deter police misconduct.

* * *

The reasoning of *Leon* fully applies to the case at hand. Panels of this Court have upheld searches at the Sierra Blanca checkpoint numerous times, and appellants do not suggest that this court is "inclined to ignore or subvert the Fourth Amendment." *Id.* at 916, 104 S.Ct. at 3417.

* * *

It follows from this holding that in other cases the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law on the date of the delivery of this opinion.

The appellants' convictions are AFFIRMED.

Ryan, Slip Opinion, at 33-35.

It is this second holding which this Petitioner asks this Court to reevaluate upon a Petition of Certiorari.

———o———

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE GOOD FAITH EXCEPTION CANNOT PROPERLY BE APPLIED IN THIS CASE IN ABROGATION OF THE CENTRAL PRINCIPLES AND OPERATION OF OUR NATION'S COMMON LAW SYSTEM OF JUSTICE.

II.

THE GOOD FAITH EXCEPTION CANNOT PROPERLY BE APPLIED TO BAR OPERATION OF THE EXCLUSIONARY RULE IN A CASE WHERE A LITIGANT WAS CHALLENGING A COURT-SANCTIONED PRACTICE AFFECTING THE CONSTITUTIONAL RIGHTS OF MILLIONS OF CITIZENS AND RESIDENTS OF THIS COUNTRY.

This cause is especially deserving of a grant of certiorari review by this Court. This case involves a legal question of first impression as to whether the good faith exception lately fashioned by this Court should be applied to judicial decisions. In addition, it involves a vital and compelling question regarding the effects of such a decision on the growth and evolution of the Common Law. Application of the good faith exception under the circumstances of this case would deliver a body blow to the principles of Common Law and thwart the exposure and correction of wide spread abuses and abridgements of the constitutional rights of our citizens. It has been said that ". . . a case is the written memorandum of a *controversy* between persons . . ." Dowling, Patterson, and Powell, *Materials or Legal Method,* Chicago Foundation Press (1946). Henry Abraham wrote ". . . thus, the Judge may come closer to the just and the true for law under the com-

mon law system developed by 'judicial experience in the decision of *cases.*'" Abraham, *The Judicial Process,* Oxford University Press (1986) at p. 11, quoting Roscoe Pound, *The Spirit of the Common Law,* Little Brown (1921) at p. 216. As former Justice Benjamin Cardozo wrote:

> The Common Law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars. The process has been admirably stated by Munroe Smith: "In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice.
>
> Cardozo, *The Nature of the Judicial Process,* Yale University Press (1924) at pp. 22-23.

Speaking of those who bring these experiments into the Courts, Professor Munroe Smith wrote:

> The client cares little for a 'beautiful' case! He wishes it settled somehow on the most favorable terms he can obtain. But as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent.
>
> Smith, *Jurisprudence,* Columbia University Press (1909) at p. 1.

It was the client "RYAN" and his fellow co-appellants, JACKSON and RYAN, also "clients" who brought this

issue before the court. How else could the U.S. Court of Appeals for the Fifth Circuit have obtained jurisdiction over the matter? The U.S. Court of Appeals for the Fifth Circuit does not rove around its circuit looking for unconstitutional practices. Indeed, it is doubtful, barring an actual case or controversy that The Court of Appeals would have jurisdiction to do so if it chose to. This Court and all courts depend on individual litigants to bring such matters before it. How else could The U.S. Court of Appeals for the Fifth Circuit have been able to make the decision that it made which literally restored the Fourth Amendment rights of millions of Americans virtually at the stroke of a pen. These "clients" pursuing their selfish interests to avoid imprisonment invoked the Court of Appeals' jurisdiction on appeal, thus allowing the court of appeals the opportunity to make this important and significant opinion.

Counsel would ask this Court to consider two salient points. The first involves the everyday, practical operation of our common law system of justice. Counsel would ask this Court if it seriously expects that criminal defendants will spend thousands of dollars on appeal to secure what is in effect a declaratory judgment applicable only to future criminal defendants? Of course not. And how else would these cases be brought and the unconstitutional practices exposed save for the criminal defendant pursuing his own appeal for his own selfish reasons? In this counsel's knowledge, in the eleven years since The U.S. Court of Appeals for the Fifth Circuit bestowed the mantle of "functional equivalent of the border" on the Sierra Blanca checkpoint in *U.S. v Hart,* 506 F.2d 887 (5th Cir.

1975), not a single civil litigant has sought damages from the United States based on the fact that his truck or automobile was opened and examined (and good faith would probably preclude even the minimal damages envisionable if such a suit had been brought). However, on the other hand, criminal defendants have brought this issue before The U.S. Court of Appeals for the Fifth Circuit numerous times. Thus, we can see that the good faith exception as applied to the circumstances of this case and similar cases would have, not a chilling effect, but an actual freezing effect on the exposure and redress of widespread unconstitutional practices.

Also, if the Government itself decided that it should seek certiorari from this Court in order to challenge that part of the court of appeals' decision which stripped Sierra Blanca of its functional equivalent status, who could be expected to defend that court's decision (and the Constitution)? Surely not a litigant who has been informed that he will do eight years if he wins and eight years if he loses.

The second important issue to which this Counsel would direct this Court is an even more solid roadblock to the protection of constitutional rights of Americans. Simply put, under the *en banc* decision of The U.S. Court of Appeals for the Fifth Circuit, no court would have jurisdiction to hear issues such as the one brought by this Petitioner. This Petitioner appealed on a single issue, the fact that he was searched without probable cause. The application of the good faith exception to such cases deprives such cases of a justifiable issue, a genuine controversy, et cetera; and, accordingly, deprives all courts

of jurisdiction. How can a criminal defendant appeal on an issue that will leave his conviction and his sentence untouched? Thus, if the Government ever succeeds in securing an erroneous decision in its favor such as *Hart* which sanctions an unconstitutional practice, it would be impossible for later criminal defendants to challenge this error because the good faith exception would moot their appeals. This Court would have no jurisdiction to reconsider even erroneous decisions thus placing what heretofore was a dynamic, growing common law into a straight jacket. And this straight jacket would only be applied one way. The Government, in contrast, could always challenge as erroneous any decision which they chose to challenge without the hindrance of the good faith straight jacket.

Craig Ducat wrote:

> The conversation of the judicial process is reinforced by adhering to the precept that cases should be decided on the narrowest possible ground. If incrementalism in judicial decision making provides for some movement in the law, as against that associated with a static approach of fixed rules, still the practice of deciding no more than one has to decide brakes the pace of social change.
>
> As important as these limitations on the manner by which the merits of disputes are revolved is the Court's store of instruments for nondecision. *Rulings that constrict the meaning of such requisites as case and controversy, standing, and ripeness, are critical because they govern access to the judicial process.*
>
> Ducat, *Modes of Constitutional Interpretation,* West (1978) at p. 259.

The limitation of "controversy" has been defined as:

> That is, whether the interests opposed in a given controversy are sufficiently adverse and concrete, thereby eliminating hypothetical and abstract, moot, and collusive claims, and precluding the rendering of advisory opinions. See Bator, Mishkin, Shapiro, and Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 102-149 (2d ed. 1973) [hereafter referred to as Hart and Wechsler].
>
> *Id.* at 259, N 7

The issue of "standing" has been defined as:

> That is whether the parties named in a suit are proper parties to bring legal action either because their interests have been damaged or because their legal rights have been abridged. See Shapiro, The Supreme Court and Administrative Agencies 121-125 (1968); Hart and Wechsler 150-214. Also see Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv.L.Rev. 645 (1973); Sedler, Standing Justiciability and All That: A Behavorial Analysis, 25 Vanderbilt L.Rev. 479 (1972); Monoghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973); Orren, Standing to Sue: Interest Group Conflict in the Federal Courts, 70 Am.Pol.Sci. Rev. 723 (1976).
>
> *Id.* at 259, N 8

When we apply the good faith exceptions to litigants in cases such as this we deprive them of both the prerequisite of an actual, justiciable controversy and the prerequisite of standing; and in so doing we deny those who would expose widespread unconstitutional practices access to the courts and we delay the courts jurisdiction to redress such ills. As much as the Government might wish it to be the case, we simply cannot place these fetters on the Common Law, the courts, and the Constitution.

Of course, we must deal with *United States v. Leon,* 468 U.S. 897 (1984) and *Illinois v. Krull,* 107 S.Ct. 1160 (1987). Neither *Krull* nor *Leon* compells application of the good faith exception to reliance on a judicial decision. Counsel also only argues in response to these cases that if the good faith exception to the exclusionary rule could be created because exceptional circumstances demanded it, then an exception to that exception may be created under similar exceptional circumstances. The needs of society dictated that the good faith exception be fashioned. The needs of society, specifically the needs of the Common Law, the court system, and the Constitution dictates that we fashion an exception to the good faith exception based on judicial decisions as to the actual litigants in cases which expose these widespread constitutional abuses and which provide the opportunity for the court to redress such practices. Society can surely bear the minimal burden which the few reversals required by this sharply limited exception would occasion. On the other hand, one can only wonder whether our society could bear the alternative.

III.

THE GOOD FAITH EXCEPTION IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

The Petitioner also urges that the circumstances of this case make the good faith exception inapplicable. Specifically, that the good faith exception to the exclusionary rule should not apply to judicial decisions. Neither Leon nor Krull require this result. Both involve warrants not widespread, warrantless abuses of constitutional magnitude.

The Petitioner would also argue that the good faith exception is inapplicable because the allegedly "settled"

issue was not that "settled" at all. What the border patrol officers were allegedly relying on in good faith was a group of cases which courts have described as: "this grey and nebulous area of Fourth Amendment guarantees," *United States v. Oyarzun,* 582 F.Supp. 121, 122 (W.D. Tex. 1984), and "the uncertain and ostensibly conflicting state of Fifth Circuit border search case law." *United States v. Oyarzun,* 760 F.2d 570, 573 (5th Cir. 1985). Given this confusion, a realistic, objective good faith reliance could not exist. Indeed, the Government failed to produce any testimony that the border patrol agents did in fact actually rely on any judicial holding.

Additionally, the Petitioner would argue that the fact that the U.S. District Judge had already voiced extreme disenchantment with the status of the checkpoint; that this Court had ordered a survey of this specific checkpoint; and that the survey which destroyed the factual basis for that status had been completed before the search of this Appellant, surely dissipated whatever shreds of "good faith" the border patrol allegedly was clinging to. All in all, application of the good faith exception in this case is neither required by law nor by the facts in this cause.

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CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, the Petitioner prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit; thereafter hold that the good faith exception does not apply to the case of this Petitioner, and remand this cause to the United States Court of Appeals for the Fifth Circuit with instructions that the contraband seized below should be suppressed under the exclusionary rule and the Fourth Amendment to the United States Constitution.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
Attorney for Appellant
Texas Bar No. 00820009
500 Caples Bldg.
El Paso, Texas 79901
(915) 532-1601

CHARLES LOUIS ROBERTS
Attorney for Appellant
Texas Bar No. 17000100
The Centre, Suite 306
123 Mills St.
El Paso, Texas 79901
(915) 532-5475

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CRIMINAL
v.	)	ACTION NO.
	)	P-86-CA-06
MICHAEL RYAN	)	(Filed, May 19,
	)	1986)
Defendant.	)	

ORDER

This cause came on for hearing before the court on defendant's motion to suppress evidence. The defendant has requested, and the court has allowed, to join in the motion previously filed in this court under the style of *United States v. Anthony Wayne Jackson and Charles Jackson* Criminal Action No. P-84-CA-015. In accordance with the court's ruling in open court, the motion to suppress evidence is DENIED. Following are the court's findings and conclusions.

On February 7, 1986, U.S. Border Patrol Agent Chavez, while maintaining the Sierra Blanca Checkpoint, four miles west of Sierra Blanca, Texas, on Interstate Highway 10, observed the defendant approaching the checkpoint in a white late model Chevrolet. The defendant brought his vehicle to a stop on two occasions prior to approaching the checkpoint. The defendant was driving in an "erratic" fashion, and the vehicle appeared to be swerving. These facts, naturally, aroused Agent Chavez's suspicion.

Upon approaching the checkpoint, Agent Chavez asked the defendant if he was a U.S. citizens, whereupon, after

some hesitation, the defendant responded in the affirmative. Agent Chavez testified that the defendant appeared to be "dazed," disoriented and confused. Agent Chavez initially considered the defendant to be intoxicated but could smell no odor of alcohol. Upon further questioning, the defendant stated that his trip originated in California and he was traveling *en route* to Austin, Texas.

At Agent Chavez's request, the defendant stepped out of the vehicle and opened the trunk. Once inside the trunk of the vehicle, Agent Chavez observed a brown suitcase and a small back pack. According to Agent Chavez, the defendant's nervousness increased when he (Chavez) touched the back pack. At Agent Chavez's "suggestion" the defendant opened the suitcase whereupon a large quantity of cocaine was discovered. The defendant was immediately placed under arrest.

The defendant was placed in a detention cell at the checkpoint until an appropriate DEA officer arrived. Agent Chavez testified that the defendant appeared to be further confused as to his whereabouts and why the agents were holding him.

Agent Friendsly, a veteran of 19 years with the Drug Enforcement Administration, arrived on the scene later to take custody of the defendant. Agent Friendsly corroborated Agent Chavez's version of the events by testifying that the defendant was "stoned" and appeared to be in "outer space." Additionally, Agent Friendsly testified that the defendant smelled very strongly of "ether," a substance apparently used in the refining of cocaine.

It is clear that there exists little doubt that the defendant's state of mind and lack of awareness provided the border patrol agent with ample reasonable suspicion to

conduct the search in question. *See United States v. Oyarzun*, 760 F.2d 570 (5th Cir. 1985); *Bush v. Tammany Parish*, 754 F.2d 1132 (5th Cir. 1984); *United States v. Barbin*, 743 F.2d 256 (5th Cir. 1984).

Accordingly, it is ORDERED that the motion to suppress evidence filed on behalf of the defendant MICHAEL RYAN be, and it is hereby, DENIED.

SIGNED and ENTERED this the 15th day of May, 1986.

/s/ Lucius D. Bunton
UNITED STATES DISTRICT JUDGE

App. 4

FOR THE FIFTH CIRCUIT

No. 86-1226

UNITED STATES of America,

Plaintiff-Appellee,

v.

Charles JACKSON, and Anthony Wayne Browning,

Defendants-Appellants.

No. 86-1381

UNITED STATES of America,

Plaintiff-Appellee,

v.

Michael RYAN, Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(October 1, 1987)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:
/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
See FRAP and Local Rules 41 For Stay Of The Mandate.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[PUBLISH]

Nos. 86-1226 &
86-1381

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES JACKSON and
ANTHONY WAYNE BROWNING,

Defendants-Appellants.

* * * * * * * * *

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL RYAN,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(December 24, 1986)
(Received December 29, 1986)

Before CLARK, Chief Judge, REAVLEY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellants Charles Jackson and Anthony Wayne Browning were convicted of conspiracy to possess controlled substances with intent to distribute and of possession of controlled substances with intent to distribute. Appellant Michael Ryan, in a wholly separate episode, was convicted of possession of controlled substances with intent to distribute. We have consolidated these three cases for consideration on appeal. All three appellants challenge the legality of searches conducted at the Sierra Blanca, Texas, checkpoint, operated by Border Patrol agents at the Immigration & Naturalization Service. We continue to hold that searches at this checkpoint are the functional equivalent of boarder searches, and we affirm the convictions.

I.

A. *Jackson and Browning*

On March 31, 1984, appellants Charles Jackson and Anthony Wayne Browning drove a 1984 Chrysler with California plates eastbound on Interstate 10 across west Texas. At about 3:30 p.m., they reached the Sierra Blanca Border Patrol checkpoint, located approximately four miles west of Sierra Blanca, Texas, approximately twenty miles from the Mexican border, and approximately eighty miles southeast of El Paso. Jackson was driving the car, and Browning was lying on the back seat.

At the checkpoint, Border Patrol Agent Fogt approached the car and questioned appellants about their citizenship. Both men answered that they were American citizens. Fogt testified that the men responded to his question reluctantly. Through the window of the auto,

Fogt observed cigarette rolling papers on the floor of the back seat, and a small glass pipe on the rear floorboard.[1] After viewing these items, Fogt opened the back door of the car and inspected the pipe and rolling papers, noting that the mouthpiece of the pipe was covered with a white residue.[2]

At Fogt's request, Jackson opened the trunk of the car. There, Fogt found a woman's red cosmetic case, labelled as belonging to Sherry Bradley. Inside the case was a bottle of pills which Jackson identified an antihistamines. In fact, the pills were "Preludin," a controlled substance. Inspecting the rest of the trunk, Fogt found boxes and sacks containing over 3500 "Preludin" pills. Further inspection of the back seat of the Chrysler led to the discovery of marihuana residue.

At first, appellants denied any knowledge that there were drugs in the car, asserting that the Chrysler had been rented and loaded by a person otherwise not involved in the case, Jim Johnson, in California. However, Jackson was listed as a driver on the rental contract, and he later admitted that he knew the drugs were in the car. Browning never admitted to such knowledge.[3] He did admit, however, that he saw in the trunk the boxes and red cosmetic case which contained the pills and that the cig-

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[1] While Jackson asserted that Fogt could not have seen the pipe from the window, Browning admits that the agent did see the pipe when he looked into the car.

[2] The residue was later identified as cocaine.

[3] Browning claimed that he went along for the ride from California only because Jackson's mother was paying him $200 to drive the car to Texas with Jackson.

arette rolling papers in the back seat had fallen out of his pocket.

Appellants were indicted for conspiracy to possess Preludin with intent to distribute and for the substantive offense of possession with intent to distribute. At trial, they moved to suppress all the evidence seized at the Sierra Blanca checkpoint, and the district court granted the motion. *See United States v. Oyarzun,* 582 F. Supp. 121 (W. D. Tex. 1984). We reversed and remanded, holding that the search of the car at Sierra Blanca was valid because the checkpoint was the functional equivalent of the border. *United States v. Oyarzun,* 760 F.2d 570 (5th Cir. 1985).

On remand, appellants requested that a traffic survey be conducted at Sierra Blanca to test the validity of the checkpoint's "functional equivalent" status. The district court granted the request, ordering the Border Patrol to conduct a survey of all traffic passing through the Sierra Blanca checkpoint for a period of two weeks. We stayed the order, then vacated it in a writ of mandamus issued on October 21, 1985. Appellants made a second motion requesting that the Federal Public Defender's office be given authority to take a survey. The district court granted this motion. After setting various guidelines, we granted the Public Defender's office the requested authority to conduct a survey from January 8 through January 15, 1986.

The survey, at the request of appellants, asked drivers to state (1) the point of origin of their present trip, and, if that point was outside the United States, (2) whether the traveler had already been stopped and inspected or questioned at a port of entry into this country or at some other checkpoint. The overwhelming majority of the driv-

ers stopped at the Sierra Blanca checkpoint stated either that they had begun their trip in the United States, or that they had already been stopped at a port of entry or other checkpoint.[4]

Appellants presented the survey results to the district court. The court held that the survey evidence, collected in January 1986, did not establish the conditions present in March 1984, when appellants were stopped. Accordingly, the court held that the checkpoint's status as the functional equivalent of the border in 1984 was unaffected by the new evidence.[5] Subsequently, the court found appellants guilty on all counts, and sentenced them to concurrent three-year terms of imprisonment.

Before passing sentence on appellant Browning, the district court gave him the opportunity to address the court, and he did so. The court did not, however, give Browning's counsel the opportunity to address the court

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[4] The survey was conducted at the request of appellants under authority granted by this Court. We do not accept or reject the findings as demonstrative of any traffic pattern at the Sierra Blanca checkpoint. We have great reservations, however, concerning the reliability of conclusions drawn by appellants based upon the survey. The questions inquired as to the origin of a driver's journey, not as to whether the journey took him across the border. The irrelevance of the answer to the former question is demonstrated by the five drivers who stated that their point of origin was Hawaii. Of course, this answer tells nothing about whether these cars had been across the border and thus constituted "international" traffic. The same can be said for the six-hundred odd drivers travelling east whose origins were in states east of El Paso.

[5] The district court also concluded that the new evidence was sufficient to establish that, as of January, 1986, the Sierra Blanca checkpoint could not enjoy "functional equivalent of the border" status.

on Browning's behalf before sentence was pronounced. Browning's counsel pointed out that he had not waived his own right of allocution. The district court apologized, and then gave appellant's counsel the opportunity to address the court. Browning's counsel did so, after which the court stated: "I apologize to counsel for overlooking allocution. My sentence would be the same, even though I would consider the remarks."

Appellants now claim that the Sierra Blanca checkpoint did not meet the requirements for classification as the "functional equivalent of the border" at the time of their arrest, and that probable cause did not exist to search their vehicle. Appellant Browning also challenges the sufficiency of the evidence regarding his convictions for conspiracy and possession, and claims prejudicial error in his sentencing before his attorney's allocution.

B. *Ryan*

On February 7, 1986, approximately one month after the Sierra Blanca survey had been conducted by the Federal Public Defender's office, appellant Michael Ryan drove a white Chevrolet up to the Sierra Blanca checkpoint. Border Patrol Officer Felix Chavez noticed that Ryan's vehicle swerved and halted suddenly several times as it approached the checkpoint. Chavez questioned Ryan about his citizenship, and Ryan responded hesitantly. He appeared dazed and disoriented, to the point of appearing intoxicated, although Chavez smelled no alcohol.[6]

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[6] Chavez also noticed a black leather pouch on the front seat. The bag contained cocaine and drug paraphernalia. Chavez did not search the pouch, however, until after cocaine was found in a search of the trunk.

Chavez asked Ryan to step out of the car and open the trunk. Ryan walked very unsteadily to the back of the car, and had trouble getting his key in the trunk lock. The trunk contained a backpack and a suitcase. Chavez noticed that Ryan became visibly nervous when the officer felt the backpack. Chavez instructed Ryan to open the suitcase. Ryan asked, "Do I have to?", and Chavez answered, "Yes, sir, you have to." Chavez discovered approximately seven pounds of cocaine in the suitcase.

Appellant was immediately arrested by the Border Patrol. Four hours later, a representative from the Drug Enforcement Agency arrived to take custody of Ryan. Ryan appeared "totally stoned" to the DEA agent: his speech was incoherent, his gait unsteady, and he smelled very strongly of ether. Ryan told the agent that his occupation was "to move things around." While being driven to Pecos, Texas, Ryan claimed that he was being kidnapped and asked the DEA agent if he could call the FBI.

Ryan was charged with possession of cocaine with intent to distribute. He moved to suppress all the evidence obtained at the Sierra Blanca checkpoint on the basis that the search conducted there was illegal. The district court held that the checkpoint, in February, 1986, was not "the functional equivalent of the border," but nevertheless denied appellant's motion to suppress on the basis that "ample reasonable suspicion" was present to justify the search in this case. The court found appellant guilty as charged, and sentenced him to a ten-year prison term. Appellant now claims that "probable cause," not "reasonable suspicion," was the proper standard to apply in order to test the validity of the search, and that such probable cause did not exist.

II.

All of the appellants raise the issue of the status of the Sierra Blanca checkpoint as the "functional equivalent of the border." We have considered the issue several times, and each time we have held that the classification was appropriate. *See United States v. Oyarzun,* 760 F.2d 570 (5th Cir. 1985); *United States v. Dreyfus-de Campos,* 698 F.2d 227 (5th Cir. 1983), *cert. denied,* 461 U.S. 947, 103 S. Ct. 2128, 77 L.Ed.2d 1306; *United States v. Luddington,* 589 F.2d 236 (5th Cir. 1979); *United States v. Hart,* 506 F.2d 887 (5th Cir. 1975), *vacated and remanded,* 422 U.S. 1053, 95 S. Ct. 2674, 45 L.Ed.2d 706, *reaff'd* 525 F.2d 1199 (5th Cir. 1976)(on remand), *cert. denied,* 428 U.S. 923, 96 S. Ct. 3234.

Needless to say, we will not reconsider this issue each time a search is made at Sierra Blanca. In *United States v. Salinas,* 611 F.2d 128, 130 (5th Cir. 1980), we stated:

> It is not required that the underlying facts concerning a particular checkpoint location be proved over and over again in each case arising out of the same checkpoint location, so long as such facts remain unchanged. A court may take judicial notice of functional equivalent status once it has been established.

None of the evidence presented by appellants demonstrates any change in traffic patterns at Sierra Blanca. In fact, appellants Jackson and Browning assert that no such changes have occurred since the time of their arrest in 1984.

The established law is clear. Searches at the Sierra Blanca checkpoint are the functional equivalent of border searches and meet the Fourth Amendment requirement of reasonableness. In *Hart,* we based that finding of reason-

ableness on "the proximity of the checkpoint to the border, the permanent nature of the checkpoint, and the hours of operation." 506 F.2d at 895. After discussing these factors in detail, we concluded by commenting on the practical need for law enforcement near the border:

> With so much access to a highway parallel to the border by aliens who could easily have walked across the border, we think the Fourth Amendment rule of reason would permit a search for those aliens of vehicles that may have taken them aboard after their arrival by other means within our boundaries. With almost 2000 miles of Mexican border from Brownsville, Texas, to San Diego, California, contiguous to four of the states of the Union, the impracticality of guarding every part where human crossing could be made should be so apparent as to make inexorably reasonable some method of curtailing illegal entry such as established at the Sierra Blanca checkpoint.

Id. at 897. Those circumstances are as fully applicable today as they were eleven years ago. Accordingly, we hold once again that the Sierra Blanca checkpoint is the functional equivalent of the border. It was the functional equivalent in March, 1984 and also in February, 1986. We find nothing in the submitted evidence in these cases to show a change in the nature of the checkpoint which raises doubts about border equivalency. Certainly the survey, taken in the light most favorable to appellants, does not do so. As we have said several times, we will not reconsider a change in the status of the checkpoint absent such a showing of change in the factual circumstances. *See e.g. Dreyfus-de Campos,* 698 F.2d at 229; *Luddington,* 589 F.2d at 242. Thus, searches are properly conducted at the Sierra Blanca checkpoint by Border Patrol agents without a finding of probable cause. Appellants' motions for the sup-

pression of the evidence at their trials were properly denied. We do not accept the conclusion of the district court, however, that the Sierra Blanca checkpoint is no longer the functional equivalent of a border checkpoint. We hold again that it is.

III.

Appellant Browning claims that even if the evidence from the search is admitted, that evidence is insufficient to support both his conviction on the conspiracy count and his conviction on the possession count. In reviewing whether there is sufficient evidence to convict, it is not necessary that the evidence exclude every reasonable hypothesis of innocence. *United States v. Bell,* 678 F.2d 547, 549 (5th Cir. 1982) (*en banc*), *aff'd on other grounds,* 462 U.S. 356, 103 S. Ct. 2398, 76 L.Ed.2d 638 (1983). Rather, we need only determine that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict. *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed.2d 680 (1942).

In order to prove possession with intent to distribute, the government must demonstrate (1) knowing (2) possession of the controlled substance (3) with intent to distribute it. *United States v. Vergara,* 687 F.2d 57, 61 (5th Cir. 1982). These elements may be proved by circumstantial as well as direct evidence. *Id.* at 61-62. Viewing the evidence and the inferences that may be drawn from it in the light most favorable to the government, we have no difficulty finding that appellant Browning's conviction for possession of controlled substances is adequately supported.

Browning's constructive possession of the controlled substances is inferred from his joint dominion and control over the car, established when he admitted that he was being paid by Jackson's mother to drive with Jackson to Houston. Browning's knowledge was demonstrated by his admission that he had seen the boxes containing the pills in the trunk, by the discovery of drug paraphernalia in the back seat of the car near Browning, and by his admission (after an initial denial) that the rolling papers found on the floorboard had fallen from his pants. Finally, the quantity of Preludin pills found in the car suffices to demonstrate an intent to distribute. *United States v. Richards,* 638 F.2d 765 (5th Cir. 1981), *cert. denied,* 454 U.S. 1097, 102 S. Ct. 669, 70 L.Ed.2d 638. The evidence thus supports the conviction of Browning for possession of controlled substances with intent to distribute them.

Browning's conspiracy conviction is also supported by the record. In order to prove that appellant conspired, the government must show knowledge, intent and participation in the crime. These elements, however, need not be proven by direct evidence, but may be inferred. *Unitd States v. Dean,* 666 F.2d 174 (5th Cir. 1982), *cert. denied,* 456 U.S. 1008, 102 S. Ct. 2300, 73 L.Ed.2d 1303; *United States v. Marx,* 635 F.2d 436 (5th Cir. 1981); *United States v. Arredondo-Morales,* 624 F.2d 681 (5th Cir. 1980).

The evidence demonstrating Browning's knowledge of possession will support a finding that Browning knew of the criminal purpose of the conspiracy. His intent to conspire to commit the crime can be inferred from his admission that he knew the box containing the pills was in the trunk, and from the evidence that he was in constructive

posssession of the drugs. Finally, the totality of the evidence and the conclusions that Browning knew and intended to enter into a conspiracy support the inference that he in fact participated in that conspiracy.

IV.

Finally, appellant Browning fails to demonstrate prejudicial error in the district court's asserted violation of Fed. R. Crim. P. 32(a)(1)(b).[7] Appellant asserts that the court's failure to hear an allocution from appellant's counsel before sentencing him combined with the court's subsequent failure to change the sentences after hearing the allocution raises an inference that the district court improperly used a "mechanistic" concept of what kind of punishment a particular crime deserves.

The failure of the sentencing judge to change the sentences does not establish error on the part of the district court; it may reflect only that the judge was unmoved by the allocution. Further, the light sentences ameliorate somewhat appellant's claim of error. The court imposed two concurrent sentences of three years each with a five-year parole term, when appellant could have received sentences of thirty years in prison, lifetime parole, and fines totalling $250,000.00. Certainly these sentences permit an inference that the court was already disposed towards leniency before the allocution was heard.

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[7] Fed. R. Crim. P. 32(a) states:

> (1) *Imposition of Sentence.* . . . Before imposing sentence the court shall
>
> . . . .
>
> (B) afford counsel an opportunity to speak on behalf of the defendant; . . . .

Finally, when the court corrected its mistake and subsequently heard an allocution, it remedied whatever error it had previously committed. The remedy for sentencing without offering opportunity for an allocution is resentencing by the district court. *United States v. Turner,* 741 F.2d 696 (5th Cir. 1984). This remedy has already been implemented, and remanding the case for resentencing would accomplish nothing. Appellant's claim of prejudicial error in the court's failure to hear an allocution before sentencing is denied.

CONCLUSION

Appellants' claims attacking the validity of the searches conducted at the Sierra Blanca checkpoint are denied. The checkpoint is the functional equivalent of the border, and searches conducted there need not be based upon probable cause. The evidence is sufficient to support the conviction of appellant Browning on both the conspiracy and possession counts. Finally, the district court's failure to hear an allocution before sentencing appellant Browning was not prejudicial error when corrected by the court. The convictions are AFFIRMED.

REAVLEY, Circuit Judge, Specially Concurring:

While I agree that this panel is bound by previous Fifth Circuit decisions finding plenary searches conducted at the Sierra Blanca checkpoint constitutional, *United States v. Luddington,* 589 F.2d 236 (5th Cir.), *cert. denied,* 441 U.S. 936, 99 S. Ct. 2061, 60 L.Ed.2d 666 (1979); *United States v. Dreyfus-de Campos,* 698 F.2d 227 (5th Cir.), *cert. denied,* 461 U.S. 947, 103 S.Ct. 2128, 77 L.Ed.2d 1306

(1983), I must question that precedent. The constitutionality of the search for contraband approved in this case depends on Sierra Blanca's designation as a "functional equivalent of a border." Yet, this label does not accurately describe this checkpoint, since it does not, nor does it purport to, interdict exclusively *international* traffic crossing into the United States. Designating the Sierra Blanca checkpoint a functional equivalent of a border misconstrues the basis for providing border patrol agents plenary powers to search, and undermines the protections provided by the Fourth Amendment.

In *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973), the Court first coined the phrase functional equivalent of a border, and described two possible examples as follows:

> [S]earches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico would clearly be the functional equivalent of a border search.

The single thread connecting these two examples is the fact that searches conducted at locations functionally equivalent to a border interdict the same kind of traffic stopped at our nation's borders: international traffic. In *United States v. Alvarez-Gonzales*, 542 F.2d 226, 229 (5th Cir. 1976) (*Alvarez-Gonzales I*) this court incorporated this factor into our tripartite test for determining functional equivalency when we held that the ratio between international and domestic traffic passing through such check-

points must not be disproportionately domestic.[1] However, this circuit's understanding of "international" is not limited to the ordinary meaning of this word, since it also includes vehicles traveling close to the border but on the American side. In *United States v. Alvarez-Gonzales*, 561 F.2d 620, 623-24 (5th Cir. 1977) (*Alvarez-Gonzalez II*), we explained:

> It would make little sense indeed to adopt a definition of "international" for this purpose which excluded those very journeys which evidence and practical experience have demonstrated are most likely to commence with an illegal international border crossing. In such situations, although the vehicle has not crossed the border, its cargo has.

See also United States v. Luddington, 589 F.2d 236, 241 (5th Cir.), *cert. denied*, 99 S.Ct. 2061 (1979) ("[I]nternational traffic for checkpoint testing purposes must include traffic originating close to the border but on the American side, since vehicles which remain in this country and await their illegal human cargo are a principal means of alien smuggling.").

In the present case, a survey was conducted to evaluate the nature, or "point or origin," of the traffic passing through the Sierra Blanca checkpoint. The data collected indicated that the overwhelming majority of this traffic

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[1] The two remaining components of our test for determining functional equivalency include, first, that "it functions like a permanent border checkpoint and not . . . on a radically shifting basis approximating the peregrinations of [a roving] patrol," and second, that "as to international traffic, the checkpoint under consideration actually approximates the effect of one physically located at the border." *Alvarez-Gonzalez I*, 542 F.2d at 229.

was domestic in origin. The majority points out, however, that good reasons exist to doubt the reliability and validity of the survey's findings. Yet, whatever the validity of the survey, neither the government, nor the majority in this case, dispute the fact that a significant proportion of the traffic passing through this checkpoint has not crossed an international boundary. Because of our expansive definition of international traffic, this fact does not disqualify the Sierra Blanca checkpoint from functional equivalency status. Thus, the survey effectively has no meaning; by Fifth Circuit definition *all* traffic passing through the checkpoint is international, since the checkpoint itself is "near" the border.

The ostensible reason for including certain domestic traffic in the definition of international traffic is the very significant problem of illegal aliens crossing into this country at unmonitored points on foot, and then moving into the nation's interior by automobile. *Alvarez-Gonzalez II,* 561 F.2d at 625; *Luddington,* 589 F.2d at 240; *see generally United States v. Oyarzun,* 760 F.2d 570 (5th Cir. 1985). As we noted in *Luddington,* "[s]hort of physically patrolling the entire length of the Rio Grande, strategically well-located checkpoints are the most effective means of dealing with this serious problem." 589 F.2d at 240. While I wholeheartedly agree with this statement, I disagree that it supports the argument that the Sierra Blanca checkpoint is the functional equivalent of a border.

In this case, just as in our prior cases, the majority relies on "the practical need for law enforcement near the border" in coming to its conclusion that "[s]earches at the Sierra Blanca checkpoint are the functional equivalent of border searches." *Ante* at 10 (citing *United States v.*

Hart, 506 F.2d 887, 897 (5th Cir.), *vacated and remanded,* 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706 (1975), *reaff'd,* 525 F.2d 1199 (5th Cir.) (on remand), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 44 L.Ed.2d 1226 (1976)). This "exigent circumstances" analysis, however, cannot support the conclusion that the Sierra Blanca checkpoint is a "functional equivalent of a border"; "the 'border search' exception is not based on the doctrine of 'exigent circumstances' at all." *United States v. Ramsey,* 431 U.S. 606, 621, 97 S.Ct. 1972, 1981, 52 L.Ed.2d 617 (1977). In fact, border searches are not "embraced within the prohibition of the [Fourth] [A]mendment." *Id.* (quoting *Carroll v. United States,* 267 U.S. 132, 150, 45 S.Ct. 280, 284, 69 L.Ed. 543 (1925)). The constitutional basis for searches at border checkpoints is fundamentally different from the basis for "stops" at checkpoints in the interior of the United States. We have erred in confusing the two.

In *Ramsey,* Justice Rehnquist explained the special analysis for border searches as follows:

> Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" *by the single fact that the person or item in question had entered into our country from outside.* There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.

431 U.S. at 619, 97 S.Ct. at 1980 (emphasis added).

The Supreme Court's approval of plenary searches at the functional equivalent of a border is based on this same

principle, the only difference being that through necessity or convenience *border* searches are condoned away from the border. It is the *single fact* that the individual or item has entered this nation from outside that justifies the search. But our cases have discarded this singular justification for allowing searches at a border or its functional equivalent. As the majority opinion demonstrates, we now consider the constitutionality of "functional equivalents" without any regard to the source of the government's power to search at the border. The appellation, "functional equivalent of a border," has, itself, become our initial point of inquiry, rather than the historical basis for the power to search at the border.

Judge Goldberg, in an early dissent from this circuit's functional equivalency cases, refused to join the

> apparent belief that functional equivalency is a concept that frees the border search principle from its historical moorings, the "right of the sovereign to protect itself by stopping and examining persons and property *crossing into this country.*"

Alvarez-Gonzalez II, 561 F.2d at 627 (Goldberg, J., dissenting) (emphasis added) (quoting *Ramsey,* 431 U.S. at 616, 97 S.Ct. at 1979).[2] In *Carroll v. United States,* 267 U.S.

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[2] Judge Hill has also written objecting to this circuit's grant of discretion to government agents along the United States-Mexican border. In a special concurrence to an opinion upholding the constitutionality of the same checkpoint involved here, Judge Hill observed:

> Given the subtle expansion by this Court of the Supreme Court's original concept of the functional equivalent of a border . . . it is highly problematic

(Continued on following page)

132, 154, 45 S.Ct. 280, 285, 69 L.Ed.2d 543 (1925), the historical justification for border searches was explained as follows:

> Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

The Fifth Circuit stands alone in its departure from the historical basis for border-type searches as expressed in *Carroll*. The Ninth and Eleventh Circuits, the two circuits that most closely share the illegal alien problem confronted by this circuit, have both refrained from broadening the "functional equivalent" concept to allow interference with domestic traffic. *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974); *United States v. Garcia*, 672 F.2d 1349 (11th Cir. 1982); *see also United States v. Espinosa*, 782 F.2d 888 (10th Cir. 1986). In *Bowen*, the

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> whether the Supreme Court today would grant officials manning such checkpoints, of which Sierra Blanca is one, "unbridled discretion to search any person and any vehicle for contraband without any of the constraints normally imposed upon federal officers by this Country's Constitution."

United States v. Oyarzun, 760 F.2d 570, 579-80 (5th Cir. 1985) (Hill, J., specially concurring) (quoting *United States v. Oyarzun*, 582 F.Supp. 121, 123 (W.D. Tex. 1984)).

Ninth Circuit explained its understanding of the "functional equivalent" concept as follows:

> [F]ixed-checkpoint searches, . . . even though conducted within a "reasonable distance" from the border, are not necessarily exempt from the traditional Fourth Amendment requirement of a warrant or probable cause. . . .
>
> The "function" of a border checkpoint is to regulate border crossings. . . . [I]f a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search. One need only contemplate the volume of domestic travel between Buffalo and Rochester, New York, to see why a checkpoint between those two cities could not be the functional equivalent of a border checkpoint even though the checkpoint could be less than twenty miles from an international border.

500 F.2d at 965; *see also United States v. Whiting*, 781 F.2d 692, 695 (9th Cir. 1986) ("The 'functional equivalent' doctrine permits border searches at places other than the actual border where travelers functionally enter or exit the country.").

Our conflict with the Eleventh Circuit over the interpretation of "functional equivalents" is perhaps more significant than our differences with the Ninth Circuit over this matter. The Eleventh Circuit, once a part of the

former Fifth Circuit, adopted as precedent the decisions of this court, *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (en banc), and thus, to differ with us, had to reject the same authority the present majority relies upon. In *Garcia,* the Eleventh Circuit declined to follow our "prior decisions in using the 'functional equivalent' language to refer to Border Patrol or other checkpoint searches," because "[t]hese searches do not fit within the traditional definition of a border search, which refers to searches of persons, conveyances, or objects that have come into the United States from outside." 672 F.2d at 1365 (citing *Ramsey,* 431 U.S. at 616-19, 97 S.Ct. at 1978-80). Thus, the Eleventh Circuit joined the Ninth Circuit in limiting the "functionally equivalent" border search to checkpoints that indeed are *functionally equivalent* to a border.

The constitutional basis for searches and seizures within the United States' borders rests on entirely different principles than searches and seizures conducted at those borders. In particular, the principles and interests underlying the Fourth Amendment constrain the scope of all checkpoint stops and searches that occur away from the border or its functional equivalent. "The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte,*

428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976). Therefore, when a checkpoint intercepts traffic, some part of which is of purely domestic origin, the Fourth Amendment is implicated, and requires an independent assessment of the reasonableness of the search. The test in such cases involves a weighing of the public interest against the Fourth Amendment interests of the individual. *Terry v. Ohio,* 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879-80, 20 L.Ed.2d 889 (1968).

As our cases have recognized, the public interest here is great:

> The magnitude of the problem of aliens entering or remaining in the United States is staggering. The peculiar characteristics of the Texas-Mexican border —a river inappropriately named Rio Grande in that aliens can swim, wade and in some places walk across it easily—present serious problems for those enforcing the immigration laws.

Alvarez-Gonzales II, 561 F.2d at 625. The need for effective police measures has been amply demonstrated, and, as my colleagues have pointed out, "some method of curtailing illegal entry [must be] established." *Ante* at 10, *quoting, Hart,* 506 F.2d at 897. But the viability of the solution cannot be viewed solely by the light of the problem itself; the rights and liberties of millions of people lawfully living and traveling along the United States-Mexican border must be added to the calculus.

Enforcement officials at the Sierra Blanca checkpoint have been granted nearly free license. They assert the power of customs agents, a power, as already noted, not bridled by the Fourth Amendment. But the Fourth

Amendment does not lose its vitality as it nears the border; it safeguards all residents of this nation, whether they choose to live in Lincoln, Nebraska or El Paso, Texas.

The Fourth Amendment violation at Sierra Blanca is not the checkpoint stop; it is the unrestricted scope of the search. As the Court explained in *Martinez-Fuerte*, "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." 428 U.S. at 568, 96 S.Ct. at 3087. In *Martinez-Fuerte*, the Court approved of the stopping of vehicles at permanent checkpoints so that occupants could be briefly questioned regarding their right to be in the United States. *Id.* at 558, 96 S.Ct. at 3083. The Court also found it constitutional for border patrol agents to refer motorists to a secondary inspection area for further questioning. *Id.* at 563, 96 S.Ct. at 3085. However, the Court strictly limited the scope of these stops, specifically holding that "*checkpoint searches are constitutional only if justified by consent or probable cause to search.*" *Id.* at 567, 96 S.Ct. at 3087 (emphasis added); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975); *United States v. Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975).

Keeping in mind that the guiding principle of the Court's Fourth Amendment cases is the reasonableness of the intrusion in light of the public interests involved, we must query how the Sierra Blanca checkpoint differs from permanent checkpoints where searches are prohibited absent probable cause or consent. The primary purpose of permanent checkpoints along the United States-Mexican border is to stem the formidable flow of illegal entrants

from Mexico. *See Martinez-Fuerte,* 428 U.S. at 552, 96 S.Ct. at 3080; *Ortiz,* 422 U.S. at 891, 95 S.Ct. at 2586. Yet the government invokes the same argument here in urging us to allow substantially greater intrusions than the Supreme Court has so far sanctioned.

The single factor that may distinguish the present checkpoint from checkpoints previously reviewed by the Supreme Court is its distance from the border. Whereas in *Martinez-Fuerte* and *Ortiz* the checkpoints ranged from 65 to 90 air-miles from the border, *Martinez-Fuerte,* 428 U.S. at 545-51, 96 S.Ct. at 3077-79, *Ortiz,* 422 U.S. at 893, 95 S.Ct. at 2587, the Sierra Blanca checkpoint lies just 14 air-miles from the border. Arguably, therefore, under the reasonableness standard of the Fourth Amendment, some greater intrusion is warranted at the Sierra Blanca checkpoint than was approved in *Martinez-Fuerte.* Its proximity to the border makes the public interest stronger, and the government's success rate at apprehending illegal aliens higher. This proximity arguably supports, for example, the minimal intrusion occasioned by a brief check of compartments large enough to contain a person. *See e.g., Alvarez-Gonzalez II, supra.*

While there may be some merit to a "sliding-scale" measure of reasonableness based on a checkpoint's proximity to the border, the Supreme Court has adopted a more stringent categorical test. Under the Court's test, searches may occur at the border or its functional equivalent (where they are justified by the *single* fact that the traffic is international in character), or when they are supported by probable cause or consent. In *Ortiz* for example, the Court

expressly held "that at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." 422 U.S. at 897-98, 95 S.Ct. at 2589.

Importantly, however, the *Ortiz* Court qualified this holding in a footnote, stating that it did not "decide whether a warrant could issue approving checkpoint searches based on information about the area as a whole." *Id.* at 898 n.3, 95 S.Ct. at 2589 n.3; *see also Almeida-Sanchez,* 413 U.S. at 283-84, 93 S.Ct. at 2544-45 (Powell, J., concurring) (recommending the use of area warrants in cases involving roving patrols to balance the "legitimate interest of law enforcement with protected Fourth Amendment rights"). Since the Supreme Court did not decide this question, I will not attempt to give an answer. However, such area warrants, if approved, would serve the same function as the "sliding scale" analysis mentioned above. Specifically, a judge or magistrate would measure the reasonableness of the government intrusion by balancing the public interest with the liberty and privacy rights of people residing in or traveling through the area. At areas near the border, but not functionally equivalent to it, government interference with traffic beyond brief questioning may be justified because the public interest in stemming the flow of immigrants increases close to the border. But with a warrant requirement, such determinations would be made before the establishment of a checkpoint, based on the exigencies of the particular area, and with continuing judicial oversight.

I have concurred in this opinion solely because I am bound by our earlier cases finding the Sierra Blanca check-

point to be a "functional equivalent of a border." However, I object to this misuse of terms that substitutes for a proper resolution of the issue. If the public interest is sufficiently great, it will justify a reasonable interference with traffic near the border. We should focus on the reasonableness of the intrusion, not sweep the whole matter under an inapt label.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1226

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES JACKSON and
ANTHONY WAYNE BROWNING,

Defendants-Appellants.

* * * * *

No. 86-1381

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL RYAN,

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

(August 17, 1987)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

REAVLEY, Circuit Judge:

The purpose of this en banc rehearing is to reconsider Fifth Circuit precedent deeming a checkpoint on an interstate highway at Sierra Blanca to be a "functional equivalent of the border." Appellants' drug law violations were discovered by full searches of their automobiles

at this checkpoint. In one case capsules of a controlled substance were found in a cosmetics case in the car trunk; in the other case cocaine was found in a suitcase in the car trunk. Adhering to our prior decisions, a panel of this court upheld the appellants' convictions, and approved the searches at Sierra Blanca on the ground that this checkpoint is the "functional equivalent of the border." The en banc court now decides that the Sierra Blanca checkpoint should not have been regarded as a border equivalent. We further hold that the plenary searches presently conducted at the Sierra Blanca checkpoint are unreasonable under the Fourth Amendment. However, given the significant government interest in controlling illegal immigration, we consider the availability of area warrants that would allow inspections for illegal aliens at checkpoints near the border. Finally, we affirm the appellants' convictions because the instant searches were conducted in good faith reliance upon our earlier decisions.

I

Functional Equivalence and The Sierra Blanca Checkpoint

The circumstances responsible for bringing the appellants before this court have been recited previously, and need not be repeated here. *See United States v. Jackson,* 807 F.2d 1185, 1187-90 (5th Cir. 1986); *United States v. Oyarzun,* 760 F.2d 570, 572-73 (5th Cir. 1985). Instead, we begin by telling how the Fifth Circuit developed its own functional equivalent for controlling Fourth Amendment law.

The Supreme Court first coined the phrase "functional equivalent" of the border in *Almeida-Sanchez v.*

United States, 413 U.S. 266, 272-73, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973), describing two possible examples as follows:

> [S]earches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

The *Almeida-Sanchez* Court did not otherwise explain the meaning of this new concept, nor has the Court since elaborated its understanding of what types of checkpoints qualify as functionally equivalent to the border. The circuit courts, however, have examined in some detail the notion of functionally equivalent borders. In this section we consider the Fifth Circuit's use of the term.

The Sierra Blanca checkpoint served as the proving ground for this court's first interpretation of the phrase "functional equivalent" of the border in *United States v. Hart,* 506 F.2d 887 (5th Cir.) (*Hart I*), *vacated and remanded,* 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706 (1975), *reaff'd on remand,* 525 F.2d 1199 (5th Cir.) (*Hart II*), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).[1]

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[1] The *Hart I* court provided the following description of the Sierra Blanca checkpoint:

> The Sierra Blanca checkpoint is located approximately 75-85 miles southeast of El Paso, Texas, and 4 miles west of Sierra Blanca, Texas, on Interstate Highway 10. [Interstate Highway 10 runs along the entire southern

(Continued on following page)

The defendant in *Hart I* was arrested after a border patrol agent discovered approximately 397 pounds of marijuana in the trunk of his car following a routine search at the checkpoint. The *Hart I* court interpreted the Supreme Court's functional equivalency concept broadly, believing that it referred to the same permanent checkpoints for which we had long upheld warrantless searches for illegal aliens. 506 F.2d at 889-92 n.1 (see cities contained therein).[2]

(Continued from previous page)

> rim of the United States, connecting Los Angeles, California and Pensacola, Florida.] Leaving El Paso Interstate 10 parallels the United States-Mexico border in a southeasterly direction for approximately 50 miles, coming within two miles of the border itself at many places. Before reaching the checkpoint, Interstate Highway 10 turns in a northeasterly direction away from the border with the result that, at the checkpoint itself, the highway runs in an east-west direction.
>
> . . . .
>
> The Sierra Blanca checkpoint itself is situated 20 land miles and 14 air miles from the United States-Mexico border.
>
> . . . .
>
> The Sierra Blanca checkpoint is permanent in nature. Approximately one mile west of the checkpoint on Interstate Highway 10, there is a sign which reads, "Inspection station, all vehicles exit one mile." Somewhat closer to the checkpoint, between one-half and three-fourths of a mile west, a second sign reads, "Form one lane right." One thousand yards west of the checkpoint, a third sign, states, "Inspection station, all vehicles right lane."

506 F.2d at 896.

[2] In *Hart II*, after reconsidering its earlier judgment in light of *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975), and *United States v. Brignoni-Ponce*, 422 U.S. 873,

(Continued on following page)

The court identified three characteristics that "transform" a checkpoint into the border's functional equivalent and make searches there *reasonable:* "the proximity of the checkpoint to the border, the permanent nature of the checkpoint and the hours of operation." *Id.* at 895. The original rationale for affixing the "functional equivalent" label to the Sierra Blanca checkpoint, therefore, did not depend on its functioning the same as actual border checkpoints where traffic is stopped as it enters the country; it was based on the reasonableness, under the Fourth Amendment, of stopping vehicles in the border region to check passengers' citizenship status under 8 U.S.C. § 1357(3).[3] *Id.* at 894. The court explained as follows:

(Continued from previous page)

95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the court concluded that its "decision that the Sierra Blanca checkpoint is the functional equivalent of the border means that the non-probable cause search in this case was a valid border search which met the Fourth Amendment requirement of reasonableness."

[3] Section 1357(a) provides in pertinent part as follows:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> . . . .
>
> (3) within a reasonable distance from any external boundary of the United States, to . . . search for aliens . . . [in any] vehicle . . ., for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

The corresponding regulations define "reasonable distance" to mean "within 100 air miles from any external boundary of the United States." 8 C.F.R. § 287.1(a)(2) (1987). *See also* 8 U.S.C. § 1225(a) (At the border, "[i]mmigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States.").

> [A]long much of the Mexican-United States border runs the Rio Grande River, which, in spite of a name indicating contrary magnificence, can be driven across, waded across, and easily swim across at all times, and much of the time can be walked across without wetting a foot. With so much access to a highway parallel to the border by aliens who could easily have walked across the border, we think the Fourth Amendment rule of reason would permit a search for those aliens of vehicles that may have taken them aboard after their arrival by other means within our boundaries. With almost 2000 miles of Mexican border from Brownsville, Texas to San Diego, California, contiguous to four of the states of the Union, the impracticality of guarding every part where human crossing could be made should be so apparent as to make inexorably reasonable some method of curtailing illegal entry such as established at the Sierra Blanca checkpoint.

Id. at 897.

The next important Fifth Circuit case to consider what kind of checkpoint merits functional equivalency status was *United States v. Alvarez-Gonzalez,* 542 F.2d 226 (5th Cir. 1976) (*Alvarez-Gonzalez I*), a case concerned with a checkpoint at La Gloria, Texas. The *Alvarez-Gonzalez I* court adopted a tripartite test for determining functional equivalency: (1) the ratio between international and domestic traffic passing through such checkpoints must not be disproportionately domestic; (2) it must be a permanent checkpoint; and (3) as to international traffic, it must approximate the effect of one physically located at the border. *Id.* at 229. The test prescribed in *Alvarez-Gonzalez I* appeared to narrow the *Hart I* test somewhat, by limiting functional equivalent of the border checkpoints to ones interdicting predominantly "international traffic." On re-

mand, the district court found that the La Gloria checkpoint merited functional equivalency status under the *Alvarez-Gonzalez I* test, and we affirmed. *United States v. Alvarez-Gonzalez,* 561 F.2d 620 (5th Cir. 1977) (*Alvarez-Gonzalez II*).

Following the court's earlier remand, the border patrol conducted a survey to assess the ratio of international to domestic traffic passing through the checkpoint. The survey indicated that sixty percent of this traffic was international in origin. Significantly, however, the survey included as "international traffic" vehicles that had originated in the "immediate border area" *on the American side.* The court defended the use of this measure as follows:

> It would make little sense indeed to adopt a definition of "international" for this purpose which excluded those very journeys which evidence and practical experience have demonstrated are most likely to commence with an illegal international border crossing. In such situations, although the vehicle has not crossed the border, its cargo has.

Id. at 623-24.

By adopting a definition of international traffic that included domestic traffic, the *Alvarez-Gonzalez II* court, like *Hart I* before it, "struck a balance between the needs of law enforcement and the constitutional rights of residents near the Mexican border." *Id.* at 625. The court determined that the Fourth Amendment's rule of reason allowed the government at the La Gloria checkpoint to conduct "a cursory inspection for alien passengers limited to cavities large enough to contain a human form." *Id.* The court specifically noted, however, that a more in-

trusive search for contraband "could well result in the striking of a different balance in determining a checkpoint's status as a functional equivalent of the border." *Id.*

We returned to the Sierra Blanca checkpoint in 1979 to consider the constitutionality of a search that uncovered 138 pounds of marijuana in the trunk of an MGB sports car. *United States v. Luddington,* 589 F.2d 236, 237 (5th Cir.), *cert. denied,* 441 U.S. 936, 99 S.Ct. 2061, 60 L.Ed.2d 666 (1979). Relying on *Hart I* and *Alvarez-Gonzalez II,* the *Luddington* court upheld the constitutionality of the search on the basis of the continuing need to carefully monitor the border area in order to intercept aliens who had recently crossed the border unchecked. The court also observed that the checkpoint only minimally affects domestic traffic, but at the same time reiterated the need for a definition of international traffic not limited to traffic which has crossed the border, "since vehicles which remain in this country and await their illegal human cargo are a principal means of alien smuggling." *Id.* at 241.

For the first time in *Luddington,* however, we upheld a search of compartments too small to hide an illegal alien. The border patrol agent there could only open the small MGB trunk a few inches, because of a luggage rack, but far enough to know that no illegal aliens were hidden inside. The agent was able to observe several packages wrapped in plastic, which led him to refer the vehicle to a secondary inspection area where the marijuana was discovered. The authority for the search derived solely from the checkpoint's status as a border equivalent; probable cause was not raised as an alternative ground to support the search. Although the *Luddington* court pur-

ported to follow the rule of *Alvarez-Gonzalez II,* it did not comment upon the intrusiveness of the search, which went significantly beyond any of the checkpoint searches previously approved by this court. For the first time in *Luddington,* therefore, the court invested agents at the Sierra Blanca checkpoint with the same authority to search that agents possess at the nation's border, based solely on the checkpoint's designation as a border "equivalent," but without any independent assessment of the resaonableness of the searches themselves.

Any doubts about the scope of the government's power to search at the Sierra Blanca checkpoint were answered in *United States v. Dreyfus-de Campos,* 698 F.2d 227 (5th Cir. 1983), where we upheld a search of a shaving kit. The court held, " '[i]t is not required that the underlying facts concerning a particular checkpoint location be proved over and over again in each case arising out of the same checkpoint location, so long as such facts remain unchanged.' " *Id.* at 229 (quoting *United States v. Salinas,* 611 F.2d 128, 130 (5th Cir. 1980)). Finding no evidence to suggest changed circumstances since *Luddington,* the court upheld the constitutionality of the search. Once again, however, the court did not analyze the justfication for the searches being conducted at the Sierra Blanca checkpoint, which fully matched those conducted at the border.

More recently, panels of this court have again upheld the constitutionality of complete searches at the Sierra Blanca checkpoint on the basis of its status as a border equivalent. *United States v. Oyarzun,* 760 F.2d 570, 576 (5th Cir. 1985); *United States v. Jackson,* 807 F.2d 1185,

1190 (5th Cir. 1986). As the panel opinion in the present case flatly stated: "The established law is clear. Searches at the Sierra Blanca checkpoint are the functional equivalent of border searches and meet the Fourth Amendment requirement of reasonableness." *Id.*

II

The Fourth Amendment and Functional Equivalents of The Border

As the cases described in the previous section indicate, this circuit's designation "functional equivalent of the border" has been founded on the Fourth Amendment's "rule of reason," in light of the "staggering" problem of aliens entering the United States illegally, and with the impossibility of stemming this illegal tide by patrolling the full length of the nation's expansive southern border with Mexico cited as justification for searches away from the border. However, contrary to the "exigent circumstances" analysis of our cases, the constitutionality of searches conducted at a border equivalent does not depend on a Fourth Amendment analysis. Searches at checkpoints functionally equivalent to the border are premised upon the same principles supporting similar searches at the border itself, *Almeida-Sanchez,* 413 U.S. at 272, 93 S.Ct. at 2539; and "the 'border search' exception is not based on the doctrine of 'exigent circumstances' at all." *United States v. Ramsey,* 431 U.S. 606, 621, 97 S.Ct. 1972, 1981, 52 L.Ed. 2d 617 (1977). In fact, border searches are not "embraced within the prohibition of the [Fourth] [A]mendment." *Id.* (quoting *Carroll v. United States,* 267 U.S. 132, 150, 45 S.Ct. 280, 284, 69 L.Ed. 543 (1925)). The constitutional

basis for searches at border checkpoints is fundamentally different from the basis for "stops" at checkpoints in the interior of the United States. Our cases have erred in confusing the two.

In *Ramsey*, (now Chief) Justice Rehnquist, writing for the Court, explained the special analysis for border searches as follows:

> Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" *by the single fact that the person or item in question had entered into our country from outside.* There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This long-standing recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.

431 U.S. at 619, 97 S.Ct. at 1980 (emphasis added). *See also United States v. Montoya de Hernandez*, 473 U.S. 531, —, 105 S.Ct. 3304, 3318, 87 L.Ed.2d 381 (1985) (Brennan, J., dissenting) ("the power of Congress to authorize wide-ranging detentions and searches [at the border] *for purposes of immigration and customs control* is unquestioned") (emphasis in original).

The Supreme Court's approval of searches at checkpoints functionally equivalent to the border is based on this same principle, the only difference being that through necessity or convenience *border* searches are condoned away from the border. It is the *single fact* that the individual or item has entered this nation from outside that justifies the search. *Montoya de Hernandez*, 473 U.S. at

—, 105 S.Ct. at 3309. The Court in *Carroll v. United States*, 267 U.S. at 154, 45 S.Ct. at 285, explained why such border searches are reasonable:

> Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to be a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

By including domestic traffic in our definition of international traffic,[4] our cases have perverted the limiting

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[4] A survey conducted by the Federal Public Defender's Office between January 8 and January 15, 1986 found that an overwhelming number of motorists passing through the Sierra Blanca checkpoint had begun their trip in the United States or had been previously inspected at a port of entry or other checkpoint. The survey asked drivers to identify the point of origin of their present trip; and if that point was outside the United States, the surveyor asked the respondent whether he had already been stopped and inspected at a port of entry into this country or at some other checkpoint. The panel opinion correctly expressed serious reservations concerning the reliability of the conclusions drawn from the survey. The panel explained that "[t]he questions inquired as to the origin of a driver's journey, not as to whether the journey took him across the border. The irrelevance of the answer to the former question is demonstrated by the five drivers who stated that their point of origin was Hawaii." *United States v. Jackson*, 807 F.2d 1185, 1188 n.4 (1986). Of course, in light of this circuit's definition of "international traffic," asking whether the motorist had just come across the border also would have been improper. Nonetheless, if the nature of traffic is in doubt on a roadway being considered for a functional equivalent of the border checkpoint, a survey with well crafted questions could be a very useful tool. *See generally* Monahan & Walker, *Social Science in Law* (1985).

principle inherent in the border search exception. The government's power to stop and examine vehicles crossing into this country derives solely from the sovereign's right of self-protection. *Ramsey*, 431 U.S. at 616, 97 S.Ct. at 1978; *see generally*, Note, *Functional Equivalents of The Border, Sovereignty, and The Fourth Amendment*, 52 U. Chi. L. Rev. 1119 (1985). Motorists lawfully travelling on this nation's roadways are clothed with Fourth Amendment protection from arbitrary government interference. Therefore, only searches of persons or effects that have crossed the border may be deemed functionally equivalent to border searches and hence be excepted from the Fourth Amendment's compass. This limitation is consistent with the interpretation other circuits have given the functional equivalency notion. *See, e.g., United States v. Garcia*, 672 F.2d 1349, 1365 (11th Cir. 1982) (Functional equivalent of the border "searches are truly border searches because their sole justification is the fact that the border has been crossed."); *accord United States v. Sugrim*, 732 F.2d 25, 29 (2d Cir. 1984); *United States v. Caminos*, 770 F.2d 361, 364 (3d Cir. 1985); *United States v. Bilir*, 592 F.2d 735, 742 n.11 (4th Cir. 1979); *United States v. One (1) 1966 Beachcraft Baron, No. N242BS*, 788 F.2d 384, 388 (6th Cir. 1986); *United States v. Carter*, 592 F.2d 402, 404 (7th Cir. 1979); *United States v. Udofot*, 711 F.2d 831, 839 (8th Cir. 1983); *United States v. Whiting*, 781 F.2d 692, 695 (9th Cir. 1986); *United States v. Mayer*, 818 F.2d 725, — (10th Cir. 1987); *Jasinski v. Adams*, 781 F.2d 843, 846 (11th Cir. 1986). In fact, cases in this circuit considering functional equivalent of the border searches as they pertain to individual searches of persons or effects also hold that an actual border crossing must have occurred to justify a search.

In *United States v. Amuny,* 767 F.2d 1113 (5th Cir. 1985), for example, customs agents electronically tracked a plane they suspected of being used to smuggle drugs as it left Galveston, but subsequently lost it around Palacios, Texas, a town on the coast of the Gulf of Mexico. The next day the agents picked up the plane around Palacios, and tracked it as it returned northward to Galveston. When the plane landed, customs agents searched it and found marijuana on board. At the suppression hearing, the officers explained that they based the search on their "suspicion" that the plane had crossed the border. The panel held that suspicion alone could not support the search: "To justify a search at the functional equivalent of the border, agents must demonstrate to a 'reasonable certainty' that the vehicle has, *in fact, crossed the international border.*" *Id.* at 1123 (emphasis added); *see also United States v. Niver,* 689 F.2d 520, 526 (5th Cir. 1982); *United States v. Barbin,* 743 F.2d 256, 261 (5th Cir. 1984); *United States v. Melendez-Gonzalez,* 727 F.2d 407, 411 (5th Cir. 1984). The mere opportunity to have crossed the border is not enough. *Amuny,* 767 F.2d at 1124; *see United States v. Brennan,* 538 F.2d 711, 715 (5th Cir. 1976), *cert. denied,* 429 U.S. 1092, 97 S.Ct. 1104, 51 L.Ed.2d 538 (1977). The "reasonable certainty" test "require[s] something more than a showing of probable cause but something less than proof beyond a reasonable doubt" of a border crossing. *Amuny,* 767 F.2d at 1123; *Niver,* 689 F.2d at 526.

Although our checkpoint cases developed separately from the *Amuny* line of cases, the notion of border equivalence should be the same whether referring to searches of aircraft landing after crossing the border or at check-

points located near the border, since their "reasonableness" emanates from the same source: the sovereign's historical right to inspect persons and effects entering the country. Indeed, searches of aircraft that have crossed the border and searches at checkpoints near the border were the very examples Justice Stewart cited in *Almeida-Sanchez* as possible border equivalents. Significantly, however, while he found the search of an "airplane arriving at a St. Louis airport after a nonstop flight from Mexico [to] *clearly be* the functional equivalent of a border search," he observed that searches conducted at checkpoints on roads "that extend from the border [only] *might be* functional equivalents of border searches." *Almeida-Sanchez,* 413 U.S. at 272-73, 93 S.Ct. at 2539 (emphasis added). The degree of certainty Justice Stewart expressed in the two examples derives from the relative certainty that a border crossing has occurred. Whereas a nonstop flight from Mexico has certainly crossed the border, vehicles travelling on roads leading away from the border may not have done so. Whether a checkpoint merits functional equivalency status, therefore, depends entirely on the nature of the traffic passing through it. To justify searches at checkpoints labeled the functional equivalent of the border the government must demonstrate with "reasonable certainty" that the traffic passing through the checkpoint is "international" in character. *See United States v. Mayer,* 818 F.2d 725, — (10th Cir. 1987); *United States v. One (1) 1966 Beachcraft Baron, No. N242BS,* 788 F.2d 384 (6th Cir. 1986). In practical terms, this test means that border equivalent checkpoints intercept no more than a negligible number of domestic travelers. The government concedes that the Sierra Blanca

checkpoint, and all similarly situated checkpoints, do not meet this test. We turn, therefore, to consider whether the searches now conducted at these checkpoints, though not border equivalent searches, may nevertheless be reasonable under the Fourth Amendment because of the public interests at stake.

III

The Fourth Amendment and Permanent Checkpoints

As we noted above, and as the Supreme Court has repeatedly emphasized, the constitutionality of a particular government intrusion depends on its "reasonableness." *See e.g., Montoya De Hernandez,* 473 U.S. at —, 105 S.Ct. at 3308-09; *United States v. Villamonte-Marquez,* 462 U.S. 579, 588, 103 S.Ct. 2573, 2579, 77 L.Ed.2d 22 (1983). "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). However, the Court has already conducted the necessary balancing test in the present context, and has discriminatingly calibrated the reasonable level of intrusiveness in light of the public interests at stake in these cases.

The government stresses, and our previous cases have recognized, the very serious problem of illegal aliens streaming into the United States at unmonitored points along the border. *See, e.g., Alvarez-Gonzalez II,* 561 F.2d at 625 ("The magnitude of the problem of aliens illegally entering or remaining in the United States is staggering."). Yet the public interest in the present case is the

same as that raised in all of the Supreme Court's border control cases: the "formidable law enforcement problem []" of "[i]nterdicting the flow of illegal entrants from Mexico." *United States v. Martinez-Fuerte,* 428 U.S. 543, 552, 96 S.Ct. 3074, 3080, 49 L.Ed.2d 1116 (1976); *see also Almeida-Sanchez,* 413 U.S. at 273, 93 S.Ct. at 2540; *United States v. Brignoni-Ponce,* 422 U.S. 873, 878-79, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975); *United States v. Ortiz,* 422 U.S. 891, 892, 95 S.Ct. 2585, 2586, 45 L.Ed.2d 623 (1975). In *Brignoni-Ponce,* the Court summarized the problem as follows:

> [T]he public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. . . . [T]hese aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.

422 U.S. at 878-79, 95 S.Ct. at 2579. Despite the similarity between this case and the several Supreme Court checkpoint cases, the government urges this court to approve searches at permanent checkpoints far more intrusive than any so far sanctioned by the High Court.

In a case nearly indistinguishable from the present one, the Court in *Ortiz* considered the question "whether vehicle searches at [permanent] traffic checkpoints . . . must be based on probable cause." 422 U.S. at 892, 95 S.Ct. at 2586. The checkpoint in *Ortiz* was located on the principal highway connecting San Diego and Los Angeles, approximately 62 air miles and 66 road miles north of the

border. A routine immigration inspection at the checkpoint uncovered three illegal aliens secreted in the trunk of the defendant's car. The government argued that the checkpoint's permanency distinguished its level of intrusiveness from the roving patrols found unreasonably intrusive in *Almeida-Sanchez,* 413 U.S. at 274, 93 S.Ct. at 2540. In particular, at permanent checkpoints motorists would not be frightened or annoyed by brief inspections, and officers had little discretion in deciding who to stop. The Court rejected these assertions, finding that "[t]he greater regularity attending the stop does not mitigate the invasion of privacy that a search entails." *Id.* at 895, 95 S.Ct. at 2588. The *Ortiz* Court concluded, "[t]o protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search." *Id.* at 896, 95 S.Ct. at 2588.

The public interests cited by the government in this case are identical to the ones noted by the Supreme Court in *Ortiz.* The basic operation of the Sierra Blanca checkpoint, and especially its degree of intrusiveness, is the same as well. The only possible distinction may be that Sierra Blanca stands fourteen air miles from the Mexican border in Texas, whereas the San Clemente checkpoint reviewed in *Ortiz* was located sixty-two air miles from the Mexican border in California. This distinction, however, does not justify a different result. Enforcement officials at the Sierra Blanca checkpoint have been granted nearly free license. They exercise the power to choose which cars to search, without any obligation to articulate any reason for their choice. Such unbounded discretion creates the potential for significant abuse, since any vehicle or per-

son may be stopped and searched for any reason, or no reason. *Ortiz,* 411 U.S. at 896, 95 S.Ct. at 2588.

In several early cases we suggested that allowing "a cursory inspection for alien passengers limited to cavities large enough to contain a human form" might strike a reasonable balance "between the needs of law enforcement and the constitutional rights of residents near the Mexican border." *Alvarez-Gonzalez II,* 561 F.2d at 625. Yet the very search found unconstitutional in *Ortiz* was a "routine immigration" search of a vehicle's trunk. Thus, the Court has already passed judgment upon the inspections we contemplated in *Alvarez-Gonzalez,* and found them to be unreasonable. However, the *Ortiz* Court left open the question whether less intrusive checkpoint stops, "stops for the purpose of inquiring about citizenship," could pass constitutional muster. 422 U.S. at 898-99, 95 S.Ct. at 2589-90 (Rehnquist, J., concurring).

One year after *Ortiz,* the Court examined the constitutionality of checkpoint stops less intrusive than the immigration searches declared unconstitutional in *Ortiz.* In *Martinez-Fuerte,* the Court approved the brief detention of vehicles at permanent checkpoints so that occupants could be questioned regarding their right to be in the United States. 428 U.S. at 558, 96 S.Ct. at 3083. The Court also found referrals to secondary inspection areas for further questioning constitutional. *Id.* The Court explained that, although creating some inconvenience to the motoring public, a brief detention did not impermissibly intrude on individual privacy interests. The permanent nature of the checkpoint lessens the possibility that motorists will be taken by surprise, and officers at permanent checkpoints

do not exercise the broad discretion found troubling in roving patrol stops. *See Brignoni-Ponce,* 422 U.S. at 882-83, 95 S.Ct. at 2580-81. Moreover, the intrusiveness of the stop is strictly limited, since "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." *Martinez-Fuerte,* 428 U.S. at 558, 96 S.Ct. at 3083.

Although cursory inspections of automobile trunks are less intrusive than complete searches, they are nonetheless searches under the Fourth Amendment. The Supreme Court has repeatedly emphasized that "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *Martinez-Fuerte,* 428 U.S. at 566-67, 96 S.Ct. at 3087; *see Terry v. Ohio,* 392 U.S. 1, 24-27, 88 S.Ct. 1868, 1881-83, 20 L.Ed.2d 889 (1968); *Brignoni-Ponce,* 422 U.S. at 881-82, 95 S.Ct. at 2580-81. In *Martinez-Fuerte,* the Court strictly limited the scope of stops at permanent checkpoints, specifically holding that "checkpoint searches are constitutional only if justified by consent or probable cause to search [and that] '[*a*]*ny further detention* must be based on consent or probable cause.' " 428 U.S. at 567, 96 S.Ct. at 3087 (quoting *Brignoni-Ponce,* 422 U.S. at 882, 95 S.Ct. at 2580) (emphasis added). Indeed, in every one of its many checkpoint and roving patrol cases, the Supreme Court has restricted the level of government intrusion to brief detentions only long enough to ask questions and check citizenship status. *See e.g., Villamonte-Marquez,* 462 U.S. at 592, 103 S.Ct. at 2581 (holding that random stops of vessels are reasonable because they "involve[] only a brief detention where officials come on board, visit public areas of the vessel, and inspect docu-

ments''). The Court has thus demarcated the boundary of privacy that officials at checkpoints cannot intrude without reason.

We might question whether limiting officers at permanent checkpoints to brief questioning of motorists frustrates law enforcement efforts. Checkpoint agents may stop and query motorists about their citizenship, and also request production of documents evidencing a right to be in the United States. *Martinez-Fuerte,* 428 U.S. at 559, 96 S.Ct. at 3083. Moreover, checkpoint agents may selectively refer motorists to secondary inspection areas for additional questioning without articulating any reason for doing so. *Id.* at 563-64, 96 S.Ct. at 3085. As demonstrated by their widespread use, these procedures provide an effective law enforcement tool in checking the tide of illegal immigration. *See id.* at 562 n.15, 96 S.Ct. at 3085 n.15. In practice, brief detentions at checkpoints increase agents' ability to identify illegal aliens by affording them a greater opportunity to scrutinize individual vehicles and their occupants, and thereby develop probable cause or obtain consent to support a search.

If removing the government's plenary power to search at permanent checkpoints does actually diminish effective enforcement of the immigration laws, the Fourth Amendment balance between the government intrusion and the individual's privacy right under these circumstances has been struck by the Supreme Court in *Martinez-Fuerte,* and that is dispositive of the issue for us. Nonetheless, on several occasions the Court has noted the possible availability of an alternative, the ''area warrant,'' that might allow the striking of a slightly different balance between

the government's legitimate need to control the nation's border and motorists' protected right to travel in areas near the border without interference. We will therefore consider this alternative.

IV

"Area Warrants" and Permanent Checkpoints

In his concurring opinion in *Almeida-Sanchez,* Justice Powell compared the illegal alien problem along the border to the situation presented in *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), involving housing code violations. The *Camara* Court held that administrative inspections of individual structures could be conducted on the basis of general knowledge about the area as a whole rather than specific knowledge concerning the condition of the particular building inspected. *See generally* Kress & Iannelli, Administrative Search and Seizure: Whither The Warrant? 31 Vill. L. Rev. 705, 714-17 (1986). However, these "area inspections" had to be accompanied by a warrant unless a traditional exception, such as exigent circumstances, existed. *Camara,* 387 U.S. at 539, 87 S.Ct. at 1736. The Court explained that the Fourth Amendment's guiding principle of reasonableness required the striking of a careful balance between the need for the search and the limited invasion of privacy occasioned by administrative searches accompanied by a warrant. *Id.* at 535-37, 87 S.Ct. at 1734-35. Justice Powell, and at least four other members of the *Almeida-San-*

chez Court,[5] believed that the illegal alien problem in the border region presented an analogous situation to that in *Camara*, and one which might allow limited automobile searches by border patrol agents when supported by general knowledge of the area in question and an "area warrant." *See generally* Note, Area Search Warrants in Border Zones: *Almeida-Sanchez* and *Camara*, 84 Yale L. J. 355, 360-72 (1974).

In *Camara*, the Court cited three factors for its conclusion that administrative area inspections of property were reasonable under the Fourth Amendment. These factors included a " 'long history of judicial and public acceptance,' " the lack of other means to vindicate the public interest at stake, and the "limited invasion of privacy occasioned by administrative inspections which are 'neither personal in nature nor aimed at the discovery of evidence of crime.' " *Almeida-Sanchez*, 413 U.S. at 278, 93 S.Ct. at 2542 (Powell, J., concurring) (quoting *Camara*, 387 U.S. at 537, 87 S.Ct. at 1735). Justice Powell found these three factors similarly applicable to roving patrols for illegal aliens in the border region. First, up until *Almeida-San-*

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[5] Although the four dissenting Justices in *Almeida-Sanchez* believed the searches involved there were reasonable as conducted, they noted that they also agreed with Justice Powell's assessment that these searches would be constitutional if carried out under the authority of an area warrant. 413 U.S. at 288, 93 S.Ct. at 2547 (White, J., dissenting). Justice White commented in addition that he "would expect that such warrants would be readily issued." *Id.* Moreover, the Justices joining the majority opinion divided in their agreement with Justice Powell's concurrence. *Id.* at 270 n.3, 93 S.Ct. at 2538 n.3. Therefore, at least five, and perhaps as many as seven, Justices expressed some approval of area warrants in the context of enforcing the immigration laws.

chez, courts had consistently upheld roving automobile searches for aliens in border areas. *Id.* Second, no other effective method exists to ferret out illegal aliens as they move from the border into the interior of the United States. *Id.* And third, these searches resemble administrative searches in that their function "is simply to locate those who are illegally here and to deport them," not to uncover evidence for prosecutions. *Id.* Justice Powell identified two additional factors to reinforce his analysis. Foremost, these patrols are limited strictly to the border region where the high incidence of illegal alien traffic justifies the limited government intrusion. *Id.* at 279, 93 S.Ct. at 2542. Secondly, searches of automobiles have traditionally been viewed as less intrusive than searches of persons or buildings. *Id.* Although Justice Powell suggested the use of "area warrants" to alleviate the constitutional deficiencies of roving border patrols, the concept applies equally to permanent checkpoints. *See Ortiz,* 422 U.S. at 897 n.3, 95 S.Ct. at 2589 n.3.

It is evident that the factors listed by Justice Powell as supporting border area searches of automobiles also formed the basis for the finding in our earlier cases that these searches were "reasonable" as "functionable equivalent of the border searches." *See Jackson,* 807 F.2d at 1190; *Alvarez-Gonzalez II,* 561 F.2d at 622-26. However, unlike Justice Powell's proposal, our checkpoint cases failed to place effective restrictions on the power to search in the vicinity of the border. The functional equivalence label empowered agents at permanent checkpoints to fully search vehicles without articulating any reason for the search, and dependent only on the discretion of those charged with the law enforcement function. The pressure

to discharge the law enforcement function too easily leads to the adoption of a narrow view of constitutionally protected rights. *See United States v. United States District Court,* 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972). Sensitive constitutional determinations ordinarily require the more dispassionate perspective offered by magistrates. By extending the Court's *Camara*-analysis to the border area, however, the power to search becomes subject to judicial oversight through the requirement that border area searches be accompanied by an "area warrant."

Only when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" should the warrant requirement be dispensed with. *Camara,* 387 U.S. at 533, 87 S.Ct. at 1733. Nothing in the area warrant concept itself should cause such frustration, however. The government has acknowledged that the infiltration patterns of illegal aliens is well known, and, particularly east of Sierra Blanca, their routes into the interior of the United States are relatively few, thus making permanent checkpoints extremely effective. Since illegal immigration patterns are discoverable prior to the establishment of a checkpoint, and the geography of the area remains unchanged over time, judicial review of the reasonableness of proposed procedures should not ordinarily frustrate government action.

Justice Powell identified four factors bearing on the reasonableness of an area warrant in a given case:

> (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensive-

> ness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

Almeida-Sanchez, 413 U.S. at 283-84, 93 S.Ct. at 2545. We consider only generally the application of these four factors to the permanent checkpoint at Sierra Blanca.

The first factor concerns the volume of illegal alien traffic in a particular area. The government has convincingly demonstrated the significant numbers of illegal aliens that consider I-10 through Sierra Blanca their highway to the interior of the United States. However, unlike the other three factors, this one has the potential to change over time. As the United States increases enforcement of the immigration laws, and passes new measures making the trek north less attractive for those travelling illegally, the absolute number of illegal aliens may be expected to decrease accordingly.[6] Because the facts may change, the government should demonstrate that illegal immigration remains significantly great in the area in question to support renewal of the area warrant.

The second and third factors relate to the geographic characteristics of the area where the searches will take

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[6] In particular we note the passage of the Immigration Reform and Control Act of 1986 which is intended to lessen the volume of illegal alien traffic in the border region by removing much of the economic benefit associated with coming to the United States illegally. *See* 8 U.S.C. § 1324a (making employment of unauthorized aliens unlawful).

place. The geography surrounding Sierra Blanca, and in particular the stretch of roadway between El Paso and the checkpoint, strongly supports the propriety of the selected location. Leaving El Paso, the interstate runs parallel to the border for approximately eighty miles, at times passing as close as 200 yards, before turning northward toward the checkpoint, which is situated just fourteen air-miles from the border. All along this distance illegal aliens can steal across the border by swimming, wading and, in some areas, even walking across the Rio Grande River without ever meeting a border patrol agent. *See Hart I*, 506 F.2d at 897; *Luddington*, 589 F.2d at 240. Moreover, illegal aliens traveling north or east have little choice but to pass through the Sierra Blanca checkpoint on I-10. To the north of I-10 lies a remote region with few roads, all of which are monitored by the border patrol, and to the east I-10 cuts through the Quitman Mountains, effectively creating a funnel through which virtually all traffic must pass. The special nature of this area, therefore, makes placement of the checkpoint at Sierra Blanca particularly effective.

The final factor suggested by Justice Powell for consideration is the degree to which the search interferes with the lawful travel of innocent persons. The magnitude of the intrusion should be assessed in several ways. First, when reviewing a request for an area warrant, magistrates should carefully compare the volume of illegal alien traffic with the volume of lawful domestic traffic in the area in question. This comparison may be based on general information known about the area as a whole. However, when the government seeks to renew an area warrant, it should be required to convince the magistrate of the efficacy of the checkpoint searches, either because the op-

eration has impeded the illegal traffic or apprehended a sufficient number of illegal aliens.

A second and more important measure of intrusiveness is the scope of the search. The original justification for border area searches comes from the analogy to administrative searches, i.e., searches "neither personal in nature nor aimed at the discovery of evidence of crime." *Camara,* 387 U.S. at 537, 87 S.Ct. at 1735. Searches aimed at discoverying evidence of crime tend to be more intrusive than administrative searches. *See, e.g., Ingraham v. Wright,* 430 U.S. 651, 673-74 n.42, 97 S.Ct. 1401, 1413-14 n.42, 51 L.Ed.2d 711 (1977); *see generally* Note, The Civil and Criminal Methodologies of the Fourth Amendment, 93 Yale L. J. 1127, 1135-38 (1984). Moreover, the scope of the search should be strictly confined to the purposes justifying it. *See Terry v. Ohio,* 392 U.S. at 25-26, 88 S.Ct. at 1882 ("A search . . . must . . . be strictly circumscribed by the exigencies which justify its initiation."). Therefore, when the only government interest asserted is illegal immigration, the scope of border area searches must be limited to compartments large enough to secrete a person. We decline to comment on the issue of area warrants to sanction searches aimed exclusively at uncovering evidence of crime.

Again, we note that we are not entirely convinced that *Martinez-Fuerte*-type checkpoint operations fail to give the government an adequate mechanism by which to identify vehicles carrying illegal aliens. The brief detention of vehicles with observation and questions by an experienced officer provides a substantial enforcement tool. The government bears the burden to demonstrate not only

that the public interest makes cursory inspections reasonable; it must show that less intrusive methods cannot be effective enough to meet the public interests at stake. As we read a map in this record, there is a checkpoint located on I-10 west of El Paso and within New Mexico. Because New Mexico lies in the Tenth Circuit, the intrusion there is undoubtedly patterned to *Martinez-Fuerte*. A comparison of the consequences of that checkpoint, as well as those near the Mexican border but in the Ninth Circuit, would be useful.

V

Good Faith Reliance on Fifth Circuit Precedent

Appellants urge this court to apply the exclusionary rule and suppress the evidence discovered during the searches we now deem illegal. *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra,* 414 U.S. 338, 347, 94 S.Ct. 613, 619-20, 38 L.Ed.2d 561 (1974). *In United States v. Leon,* 468 U.S. 897, 920-21, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677 (1984), however, the Court declined to apply the exclusionary rule to cases where an officer, acting in "objective good faith," had relied on a search warrant. Under such circumstances, the Court reasoned, the exclusionary rule would not deter police misconduct.

The *Leon* Court believed there was no sound reason for extending the exclusionary rule to deter misconduct

on the part of judicial officers responsible for issuing search warrants. *Id.* at 915-18, 104 S.Ct. at 3417-18; *see also Illinois v. Krull,* 107 S.Ct. 1160, 1166 (1987) (holding that the exclusionary rule does not apply where an officer acted in objectively reasonable reliance on a statute). The Court explained that there was "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Id.* at 916, 104 S.Ct. at 3417. Moreover, exclusion would have no deterrent effect, since "[j]udges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.* at 917, 104 S.Ct. at 3417. The reasoning of *Leon* fully applies to the case at hand. Panels of this court have upheld searches at the Sierra Blanca checkpoint numerous times, and appellants do not suggest that this court is "inclined to ignore or subvert the Fourth Amendment." *Id.* at 916, 104 S.Ct. at 3417. Under these circumstances,

> "[e]xcluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."

Id. at 920, 104 S.Ct. at 3420 (quoting *Stone v. Powell,* 428 U.S. 465, 540, 96 S.Ct. 3037, 3073, 49 L.Ed.2d 1067 (1967) (White, J., dissenting)).

It follows from this holding that in other cases the exclusionary rule should not be applied to searches which

relied on Fifth Circuit law prior to the change of that law on the date of the delivery of this opinion.

The appellants' convictions are AFFIRMED.

CLARK, Chief Judge, with whom GEE, WILLIAMS, and JOLLY, Circuit Judges, join concurring specially:

The words of the fourth amendment are direct and uncomplicated. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The constitutional touchstone—reasonableness—is grounded in fact, not labels. As the majority notes, the Supreme Court has made it clear that constitutional reasonableness is to be judged by balancing the individual's fourth amendment interests against legitimate governmental interests. That balancing convinces us these searches were constitutional.

I.

At oral argument it was suggested that our prior labeling of Sierra Blanca as the functional equivalent of the border would enable officers to exercise the arbitrary power of strip or body cavity searches that are sometimes used at actual border inspection ports. No such case is presented to us today, nor has any such case ever been presented in the past. We recognize that the "functional equivalent of the border" label might deceive an irresponsible officer into exceeding the limits of reasonableness. This checkpoint is not the border. The balancing analysis required in today's cases indicates it is not functionally equivalent to the border in the context presented. We agree with the majority that our prior characterization of Sierra

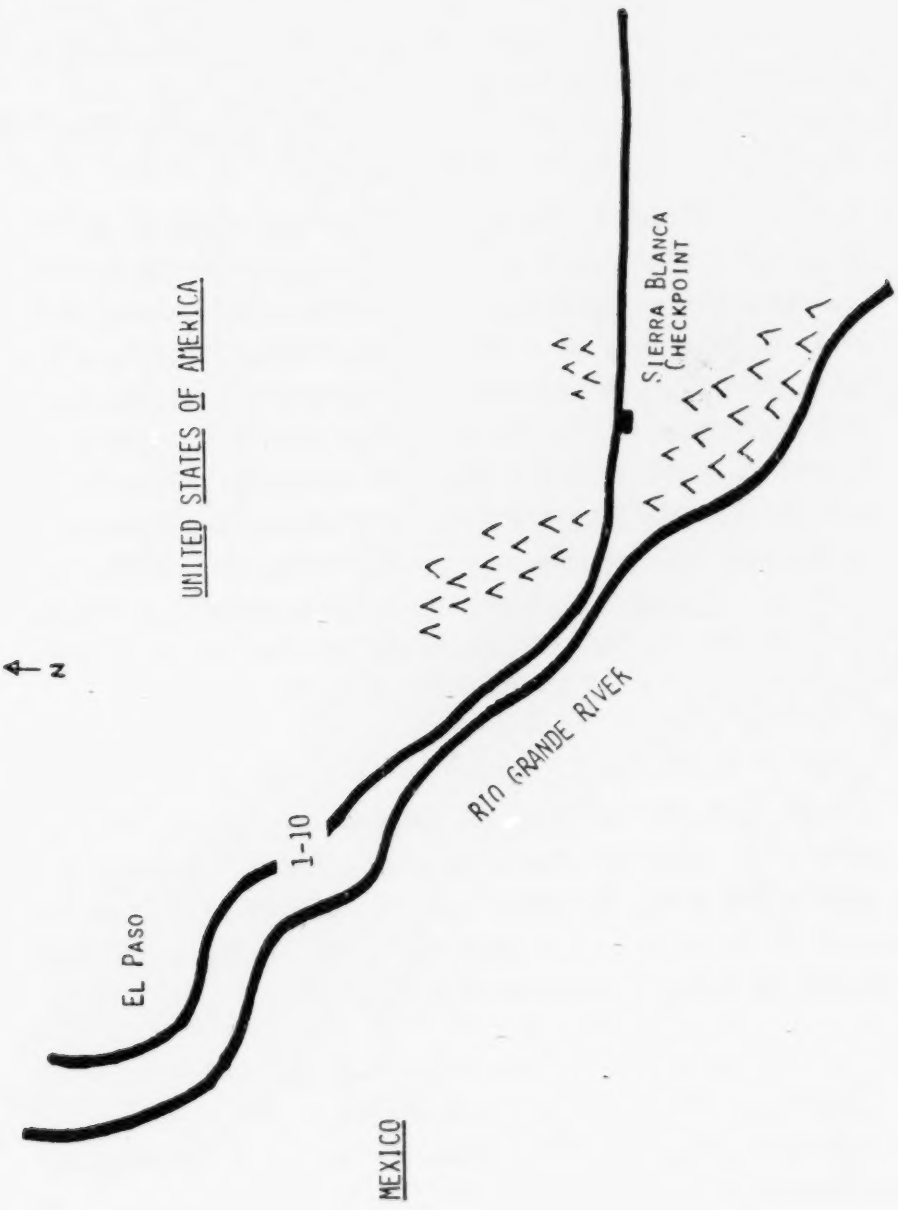
Blanca as a functional equivalent of the border is an improper generic label. We concur in overruling prior precedents which have applied it to decide the constitutionality of searches at Sierra Blanca.

II.

Since the label "functional equivalent of the border," is not talismanic, this court must analyze the facts surrounding the particular search or seizure to be tested and make a balancing of public and private interests. The same reasoning, however, forbids a decision based on merely labeling Sierra Blanca as a "permanent checkpoint." Specifically, we disagree with the majority's conclusion that the Supreme Court decisions regarding the checkpoints maintained at San Clemente, California, and at Sarita, Texas, fix the rights of citizen and government at Sierra Blanca, because we disagree with the factual and legal premises on which the conclusion is based.

III.

The records in this case establish significant factual differences between Sierra Blanca and other checkpoints involved in prior decisions. A description of the facts in these three cases best begins with a map of the area of the border in which Sierra Blanca functions:


UNITED STATES OF AMERICA
N
EL PASO
I-10
RIO GRANDE RIVER
SIERRA BLANCA CHECKPOINT
MEXICO

In footnote 1, the majority quotes a general description of the Sierra Blanca checkpoint set out in *United States v. Hart.* A more complete description, extracted from the records in these cases, would show the following.

The checkpoint is strategically located on Interstate Highway 10—the only paved road leading from the border in this area—at a pass through the Quitman, Finlay, and Sierra Blanca Mountains which form a natural funnel for traffic into the checkpoint. The checkpoint was placed at this location to prevent pedestrians from walking around it. From El Paso, Interstate Highway 10 parallels the United States-Mexico border in a southeasterly direction for approximately 60 miles, running as close as 200 yards to the Mexican border in El Paso and within a mile of the border in many other places. The checkpoint is manned by border patrol officers 24 hours a day, 365 days a year, subject only to manpower and weather condition interruptions. When the checkpoint is in operation, all eastbound traffic on Interstate Highway 10 is directed through it. Many commercial vehicles, known local residents and sufficient traffic to prevent hazardous traffic conditions from building up are waved through the checkpoint. Most of the vehicles that are stopped are detained very briefly for a check on the occupants' citizenship. Normally, only two Border Patrol officers work each shift at the checkpoint.

El Paso, a city of 500,000 people, faces the fifth largest city in Mexico—Juarez—across the Rio Grande River. Juarez has a population of 1,200,000. Large numbers of aliens enter the United States illegally in this area. A conservative estimate of the number of aliens entering the El Paso area illegally each day is 2,600 and the Border Patrol estimates that they apprehend only one in twelve. Annual figures for aliens who are illegally in the

country and apprehended by the El Paso sector of the Border Patrol for 1983 were 205,944; for 1984, 212,654; and for 1985, 240,355. The 1986 figures on illegal and apprehended aliens ran 55% higher in January and February of 1986 than it had for those same months during 1985; 1,000 aliens were being apprehended per day in March 1986, when the hearing in this case occurred.

In addition to those who enter illegally, approximately 100,000 persons a day enter the United States from Mexico through the ports of entry in El Paso. The area between El Paso and the checkpoint and between the River and Interstate Highway 10 is very sparsely populated. Thirty-seven aerial photographs of the most frequently used sites at which aliens and contraband enter the United States in the area located between the western boundary of El Paso and the checkpoint were admitted in evidence. At each of these points, the Rio Grande River can be crossed with ease at all times of the year. All the paths from these sites feed into Interstate Highway 10. Several of these photographic exhibits depict the close proximity between Interstate Highway 10 and the Rio Grande River. In some of the photographs, tracks made by vehicle and pedestrian traffic can be seen leading from the border to the highway; furthermore, several of the photographs depict aliens actually wading across the River.

Within the city of El Paso, the Border Patrol has charted approximately 150 locations which were used between January 1983 and December 1985 as staging areas in the smuggling of loads of illegal aliens and contraband into the interior of the United States. These include private residences, motels, apartment complexes, all types of businesses, including commercial truck stops. Many, if not most, of these locations abut Interstate Highway 10 as

it passes near the Rio Grande River in the city of El Paso. As the statistics for the checkpoint indicate, smugglers use virtually every kind of vehicle imaginable to smuggle their loads of aliens and contraband east on Interstate Highway 10 through the Sierra Blanca checkpoint because it is the most viable route east from the border in this area.

The number of criminal violators who are apprehended at the Sierra Blanca checkpoint is summarized in the following exhibit:

Sierra Blanca Checkpoint Statistics

	1983	1984	1985
Number of violators apprehended	4,518	4,510	3,767
Number of deportable aliens apprehended	4,083	4,181	3,461
Number of alien-smuggling principals apprehended	275>	167	149
Percentage of property seizures for the sector	40%	57%	41%
Value of drug seizures	$1,200,000	$2,896,952	
Total value of seizures	$2,697,563		
Percentage of aliens apprehended at the checkpoint who entered illegally between El Paso and the checkpoint	69% or 2,822	78% 3,254	70% 2,425

During the week of a survey made by the Public Defender, 51 illegal aliens, seven aliens smugglers, and 18 aliens who were in the process of being smuggled were apprehended at the Sierra Blanca checkpoint. In addition, six seizures of narcotics and weapons were made and one stolen car was located.

Many significant cases have been made by officers at the Sierra Blanca checkpoint; indeed, Operation Chevron, which was the largest investigation into the use of

commercial 18-wheeler trucks in the smuggling of aliens, resulted in the apprehension of the human cargoes of 22 tractor-trailer rigs at the Sierra Blanca checkpoint. Using a commercial truck stop located on Interstate Highway 10 within the city limits of El Paso as a staging area, the truckers were transporting illegal aliens, narcotics, and often weapons. This operation alone was smuggling over 300 aliens per month out of El Paso. In addition to the illegal aliens noted above, officers at the checkpoint also apprehended an escaped murderer, seized seven pounds of cocaine with a street value of $627,200, and three and a half pounds of amphetamine with a wholesale value of approximately $15,000 in just the first two months of 1986 when the survey was taken. Other examples of crimes routinely detected by the officers who man this border checkpoint were developed in the record.

IV.

It cannot be doubted that the United States has the right to secure that portion of its border with Mexico lying between El Paso and Sierra Blanca in order to regulate the inflow of aliens and contraband over this stretch of the Rio Grande River. Though it would be a monumental affront to our friendly neighbor Mexico, no one could deny the United States had the legal right to erect an impregnable wall from El Paso to the Quitman Mountains, surmounted with suitable search lights, guard towers, and gun emplacements, and could man that wall with sufficient armed troops to achieve a positive prohibition of the illegal entry of persons or property in accordance with the laws of the United States governing immigration and import.

The adequate enforcement of those laws constitutes the public interest in this case. The question we are set to decide is whether the government can substitute for the elaborate, insulting, expensive effort described above the maintenance of a minimal inspection and search net across the mouth of a natural funnel of geographic and highway features that comprise the Sierra Blanca checkpoint in the manner shown by the facts of these three cases.

As stated, we have no disagreement with the majority's basic premise. Both of us know that fourth amendment reasonableness is a product of the balancing of this public interest with the intrusion which the inspection and search process in these cases brings to bear on the drivers, passengers, and vehicles that pass through this checkpoint. Our difference arises because we would abjure all labels—"functional equivalence" and "checkpoint" alike—and strike the balance on the record facts.

Because the geography of the United States is not homogenous, the rights of citizens that live in its different parts cannot be viewed as a uniform, seamless web. Fixed checkpoint inspections and roving patrol stops, which have been approved at San Clemente and Sarita, may not be permissible on the highways of Kansas or Iowa. Similarly, what is reasonable halfway between San Diego and Los Angeles or at a point 75 road miles north of Brownsville, Texas, does not fix the weight of the public interests at Sierra Blanca.

When the operator of a motor vehicle chooses to drive his car along an interstate highway which forms the most convenient collector for illegal aliens and cargo in the El Paso/Sierra Blanca area of the border, reasonableness

dictates that he and his vehicle are subject to effective inspection and search even though that vehicle has not crossed the border. In the case of Sierra Blanca, he is fully notified that this inspection process will take place. The checkpoint is fully signed and has been regularly maintained for years.

V.

None of the Supreme Court's "fixed checkpoint" or "roving patrol" cases stamps these searches as unreasonable. In the first place, all other cases are distinctly different geographically and functionally. In testing the validity of the "inspections" made at San Clemente, the Court in *Ortiz* expressly noted that these inspections included portions of the car in which an alien might hide, typically including the trunk, under the hood and beneath the chassis. In cases of trucks, campers and the like, the inspection included enclosed portions as well. 422 U.S. at 894, footnote 1. While the *Ortiz* court forbade "searches" at San Clemente without consent or probable cause, it expressly noted that "not every aspect of a routine automobile 'inspection' as described in n.1, supra, necessarily constitutes a 'search' for purposes of the Fourth Amendment. There is no occasion in this case to define the exact limits of an automobile 'search.'" 422 U.S. at 897, footnote 3. If all conditions at San Clemente were the same as at Sierra Blanca, which they aren't, the holding in *Ortiz* still would not directly control these cases.

Brignoni-Ponce involved a roving patrol stop near San Clemente. It required a balancing of governmental and private interests and detailed these particularized considerations for that balancing: (1) characteristics of

the area; (2) proximity to the border; (3) actual patterns of traffic on the particular road; (4) previous experience with alien traffic; (5) information about recent illegal border crossings in the area; (6) drivers' behavior; (7) aspects of the vehicle, such as its size and apparent load; (8) appearance of occupants. When these eight considerations are applied to the searches in today's cases, we find that the geographic and highway characteristics of the area made Sierra Blanca the ideal spot to detect violations of the customs and immigrations laws committed in the sparsely populated region of the border between El Paso and Sierra Blanca. The highway operates as a collector of illegal traffic headed east and the mountains form a natural choke-point preventing by-pass. While the checkpoint itself is several miles from the border, its location is well designed to interdict border violations. The patterns of traffic on the road show much legal traffic, both of a local and domestic nature; however, this legal flow is a part of the mask which smugglers and drug runners use to cover their crimes. Previous experience with alien traffic shows the efficacy of the checkpoint's location and operation. Information about recent illegal border crossings in the area is overwhelming. The behavior of both drivers in these cases raised suspicion. The aspects of the vehicle were unremarkable, as were the appearance of the occupants. Rather than being a contrary precedent, *Brignoni-Ponce* strongly augurs [sic] for affirmance here.

Martinez-Fuerte dealt with checkpoint inspections at San Clemente and Sarita. Its balance of public and private interests was developed by considering whether important highways offered aliens a quick and safe route into the

interior; whether routine checkpoint inquiries would apprehend many smugglers and illegal aliens; whether generating concern or even fright on the part of the traveling public would be appreciably lessened at a permanent checkpoint which had been selected by supervisory officials to make the most effective use of limited enforcement resources; the degree of interference with the general motoring public by the practices adopted for operation of the checkpoint; and the diminished expectation of privacy in the operation of automobiles as opposed to the expectation of privacy and freedom in one's own residence.

Sierra Blanca is quintessentially a site where an important highway offers aliens and drug runners a quick and safe route into the interior if effective inspection and search is proscribed. Routine checkpoint inquiries may apprehend some few smugglers and illegal aliens, but trailer-truck and boxcar loads will pass through undetected when the right to search the vehicle is suspended. Turning Sierra Blanca into a roadside conversation spot deprives it of most of its efficacy. Clearly, the notice given by official signs and the permanence of the checkpoint give it a regular and official status that should dispel concern or fright on the part of the legal members of the traveling public. Perhaps the greatest weight in the public interest scale is the effective use of limited enforcement resources effected by the placement and operation of this facility. It enables two men to accomplish what would otherwise require thousands of people. The degree of interference with the general motoring public is minimal. Most cars are waived through. Local traffic is always passed and officers are instructed to avoid backlogs. The diminished ex-

pectation of privacy by a motorist who chooses to use this route is obvious.

VI.

Individual appraisals of reasonableness are also the basis for the rationale of the most recent opinions of the Supreme Court regarding a warrantless "inspection" of an automobile junkyard and a warrantless search of a probationer's residence. New York v. Burger, No. 86-80 [June 19, 1987, 55 U.S.L.W. 4890] and Griffin v. Wisconsin, No. 86-5324 [June 26, 1987, 55 U.S.L.W. 5156]. In *Burger* the Court began its reasoning by recognizing that the fourth amendment's prohibition on unreasonable searches and seizures applied to the commercial premises there involved and that the operator of the business had an expectation of privacy. However, the Court held that the warrantless inspection of those premises could be reasonable when three criteria were met: first, when there was a substantial government interest that informed the regulatory scheme pursuant to which the inspection was made; second, when the warrantless inspections were necessary to further the regulatory scheme; third, when the certainty and regularity of the application of the inspection program provided a constitutionally adequate substitute for the warrant by advising the owner that the search was being made pursuant to law and that the regulations under which it was made limited the discretion of the inspecting officers as to time, place and scope.

Each of *Burger's* criteria is met at Sierra Blanca. The interest of the government in controlling its borders to enforce the laws prohibiting the illegal entry of aliens and contraband is certainly as substantial an interest as the

regulation of automobile junkyards. Second, the factors which inform the maintenance of a fixed checkpoint at Sierra Blanca--- characteristics of the area, proximity to the border, previous experience with alien traffic, knowledge of recent illegal crossings and importations, and the impracticability of maintaining an alternative defense--- demonstrate that the inspections of persons and vehicles at Sierra Blanca is necessary to further the regulatory scheme. Finally, every motorist approaching the checkpoint is clearly advised that if he chooses to proceed through the checkpoint he will be subjected to inspection and search designed to detect illegal aliens and contraband. The fact that this inspection and search will only be made when the motorist drives through, will only be made at the Sierra Blanca permanent checkpoint, and will only be made in accordance with routines fixed by supervising officials, limits the time, place and scope of the action. The specific facts connected with the searches of Jackson, Browning, and Ryan, described in the panel opinions in these cases, demonstrate the complete reasonableness of the officers' actions.

In *Griffin*, the Court began its analysis with the concession that a probationer's home, like anyone else's, was protected by the fourth amendment requirement that searches be reasonable and be subject to the requirement of a warrant except when special needs made warrants or probable-cause requirements impracticable. The Court noted that exceptions had been permitted for warrantless, work-related searches of employees' desks and offices by government employers and supervisors; for searches of student property by school officials; and for searches conducted by government inspectors pursuant to regulatory

schemes such as was present in *Burger* and similar cases. The Court held that in determining whether special needs of the probation system justified the search of probationer's home on an uncorroborated tip, it would look to the practices of the officers involved under the interpretations of the governing court. The *Griffin* Court found that a warrant requirement would interfere with the probation system by letting a magistrate rather than a probation officer be the judge of how close the probationer's supervision should be. It pointed out that without the right to search, the probationer would be assured that so long as his illegal activities were sufficiently concealed as to give rise as to no more than reasonable suspicion, they would go undetected and uncorrected. In those circumstances, the Court found it was both unrealistic and destructive of the probation relationship to insist upon a showing of probable cause or the issuance of a warrant to search the probationer's home.

These same factors are applicable to weighing the governmental interest in the protection of the border against the rights of a motorist to operate a vehicle along the unique collector highway that runs into the mountainous funnel at Sierra Blanca.

We live in a society that searches citizens without warrants when they choose to use air carriers for domestic transportation, and when they elect to enter public buildings or other areas where restricted activities are conducted. The constitutional test for such searches is reasonableness. It is a test that can be administered only by weighing the facts of the situation in which the search is conducted in the public/private balance. The searches of these three defendants at Sierra Blanca passed the test.

VII.

The majority holds that the Border Patrol should follow the suggestion contained in some opinions of the Supreme Court which speculate that an "area warrant" procedure might supply constitutional reasonableness to searches made by roving patrols and at fixed checkpoints other than Sierra Blanca. Our view that procedures now employed at Sierra Blanca in these cases was constitutional would make this conjecture unnecessary here. We would only observe that the information which should be furnished to a magistrate to obtain such an "area warrant" would be the same information now utilized by Border Patrol officers in directing the present operations at Sierra Blanca. This exercise would substitute the magistrate for the experienced Border Patrol supervisors. This is precisely what the Court refused to do in *Griffin* in the magistrate-probation officer context. Given the fact that such a warrant would operate on unknown motorists in future situations which could only be predicted, it seems probable to us that the issuance of such a warrant could add to rather than detract from the intrusion on personal rights of motorists passing through the checkpoint. If the "area warrant" may only authenticate searches for aliens, it also would deprive the public interest of a significant degree of protection which our balancing would require.

Because we disagree with the holdings of the majority that these searches were unconstitutional, we concur in its conclusion that appellants' convictions should be affirmed.

GARWOOD, Circuit Judge, Concurring:

I concur in Judge Reavley's excellent opinion, and append these comments merely to note that I would prefer

the approach taken by Chief Judge Clark, at least as to searches for illegal aliens, if I believed it were open to us.

As both Judge Reavley and Chief Judge Clark demonstrate, there is a compelling national interest in workable measures for the control of illegal immigration along our southern border. A nation that cannot control its immigration is "to that extent subject to the control of another power." *Chae Chan Ping v. United States,* 9 S.Ct. 623, 629 (1889). We should be slow to "convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago,* 69 S.Ct. 894, 911 (1949) (Jackson, J., dissenting).

Given the automobile exception to the warrant clause, *see Carrol v. United States,* 45 S.Ct. 280 (1925); *California v. Carney,* 105 S.Ct. 2066, 2068-70 (1985), the provisions of 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1(a)(2), and the general reasoning employed to sustain appropriately located fixed checkpoint stops and questioning for immigration control purposes without individualized suspicion, *United States v. Martinez-Fuerte,* 96 S.Ct. 3074 (1976), I would have thought that vehicular searches for illegal aliens under like conditions also met the requirements of the Fourth Amendment without the necessity of a prior warrant for the particular checkpoint. Moreover, use of such a warrant seems to undesirably stretch the meaning of the warrant clause, given its language and history. *See Griffin v. Wisconsin,* 55 U.S.L.W. 5156, 5158-59 (June 26, 1987).

Nevertheless, I am unable to read *United States v. Ortiz,* 95 S.Ct. 2585 (1975), as being limited to fixed checkpoints similar to that at San Clemente. Rather, *Ortiz*

seems to me to hold that at *all* "traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Id.* at 2589. *See also Martinez-Fuerte,* 96 S.Ct. at 3087 ("checkpoint searches are constitutional only if justified by consent or probable cause to search"). *Ortiz's* only qualification to its search prohibition is for instances where a warrant has been issued for the checkpoint, 95 S.Ct. at 2589 n. 3, on analogy to the suggestion of the five Justices in *Almeida-Sanchez v. United States,* 93 S.Ct. 2535, 2540, 2543-45, 2547 (1973), respecting warrants for roving patrols in particular areas. It seems plain that the concerns arising from the language and history of the warrant clause are somewhat less strongly implicated in the case of a fixed checkpoint than for a roving area patrol.

Thus, I conclude that we are not free to adopt Chief Judge Clark's persuasively reasoned view, and that Judge Heavley's path is the one we must follow.

RUBIN, Circuit Judge, concurring:

As in Illinois v. Krull,[1] our opinion fails to provide an "effective remedy . . . in the very case in which the [search] at issue [is] held unconstitutional." That result, however, is ordained by the Supreme Court opinions in both *Krull* and United States v. Leon.[2] The majority opinion in both cases considered and rejected the argument that a defendant who has successfully challenged the

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1 — U.S. —, 107 S.Ct. 1160, 1177 (1987) (O'Connor, Jr., [sic], dissenting).

2 468 U.S. 897, 104 S.Ct. 3405 (1984).

constitutionality of state action should receive the benefit of suppression of the evidence unconstitutionally seized.[3] Concurring in the remainder of the opinion, I therefore concur also in Part V although I would, if not bound by Supreme Court precedent, reach a contrary decision as to the suppression of the evidence in this case.

HIGGINBOTHAM, Circuit Judge, with whom REAVLEY, Circuit Judge, joins specially concurring:

I join Judge Reavley's opinion, but write separately to note my hesitation in the suggestion that an administrative warrant might properly issue on these facts.

First, it is not clear to me that the purpose of the checkpoint is administrative and not the enforcement of the criminal laws of the United States. It is true that a substantial percentage of the intercepted illegal aliens are not prosecuted, but the persons who transport them are frequently prosecuted and many illegal aliens are prosecuted if they are repeat offenders. Second, whatever the relevance in fourth amendment jurisprudence of the argument that the government has less restrictive alternatives, it is directly relevant to administrative warrants.

Of course, the Constitution is no straitjacket tying the hands of the United States and preventing it from protecting its borders. But while the difficulties that attend our common border with Mexico are enormous, it is by no means a static problem—to the contrary. Only recently Congress made illegal the employ of illegal aliens. Until

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[3] *Krull*, 107 S.Ct. at 1169 n.11; *Leon*, 468 U.S. at 924 & n.25, 104 S.Ct. at 3421 & n.25.

this legislation, the effectiveness of which is not reflected in the data before us, we maintained the curiously ambivalent policy of simultaneously making entry illegal and tolerating the legality of the most powerful attractive force for illegal entry—a job in the United States.

The dissent argues forcefully for the reasonableness of the right of full search at this checkpoint. The data utilized, however, do not tell us whether the success of the checkpoint depended upon the full search rights the dissent would give as opposed to investigatory stops contemplated by *United States v. Martinez-Fuente* [sic], 428 U.S. 543 (1976). *See also Terry v. Ohio,* 392 U.S. 1 (1968). While disclaiming labels, the dissent effectively suspends the operation of the fourth amendment and does so without the doctrinal justification of border searches. I find no precedent for that analysis, and I am not persuaded that the Supreme Court's approval of a state rule allowing a search without probable cause of a probationer's home or its approval of a warrantless inspection of an automobile junkyard are apposite. *See Griffin v. Wisconsin,* 55 U.S.L.W. 5156) (U.S. June 26, 1987); *New York v. Burger,* 55 U.S.L.W. 4890 (U.S. June 19, 1987).

The reasonableness of a search without a warrant must have a time, place, and situation dimension; while the dissent ably describes our present extraordinarily difficult immigration problems, the justification rests on a snapshot of ephemeral facts and is used to justify an open-ended suspension of the fourth amendment. The dissent cannot escape the brooding reality of accepting that every person traveling on an interstate highway of the United States, a major east-west artery to southern

California, may be subjected to a full search at the sole discretion of a government agent without even articulable suspicion of wrongdoing. I respectfully disagree.

Perhaps administrative warrants will prove to offer the proper balance of these powerful competing interests. I reserve that judgment until we have the case. Perhaps the Supreme Court will balance in favor of a vehicular search for illegal aliens. But I will wait its reexamination of *United States v. Ortiz,* 95 S.Ct. 2585 (1975).

ROBERT M. HILL, Circuit Judge, Specially Concurring:

I gladly concur in the court's removal of the "functional equivalent of the border" label from the Sierra Blanca checkpoint. As I have written before, I do not believe the Sierra Blanca checkpoint meets either the Supreme Court's suggested descriptions of a functional equivalent of the border or our own more-specific criteria for bestowing that label. *See United States v. Oyarzun,* 760 F.2d 570, 577 (5th Cir. 1985) (Hill, J., specially concurring). I write separately, however, for several reasons.

A.

The concept of a "functional equivalent of the border" is one not lacking theoritical and practical difficulties. Since coined by the Supreme Court in dicta in *Almeida-Sanchez,* 413 U.S. at 272, we have struggled to flush this label out. As Judge Reavley points out in an excellent overview of our authority, our opinions, much like the Rio Grande, have meandered from one reason or definition to another when attempting to support the functional equivalency label. *See supra* part I, at 3-11. *See also Oyarzun,* 760 F.2d at 577-59 [sic] (Hill, J., specially

concurring) (our cases on functional equivalency have subtly expanded the concept beyond the Supreme Court's *dicta* in *Almeida-Sanchez*).

If one returns to the Supreme Court's two examples in *Almeida-Sanchez* of functional equivalents, it could be argued that functional equivalency should be a matter of pure geography. That is to say, the point that can function as the equivalent of the border must in essence mirror the geographical border of the United States for all means of transportation and persons stopped there. Justice Stewart's example of the St. Louis airport receiving a nonstop flight from Mexico is the paradigm with which no one disagrees. The other example of two roads leading from the border which later converge at a single point presents the more difficult problem, for to give this example substantive effect, we may have to forego our absolute certainty that the persons and vehicles stopped at that point of convergence have actually crossed the United States border. Only if we read that example as entailing two roads which cross the border, which are not intersected by or joined with any purely domestic road, and which then converge at a point away from the border can we obtain the same certainty, as at the airport, that the persons and vehicles passing through the point of convergence have crossed the border.[1] Such a contruction might very well as a practical matter eliminate the second of Justice Stewart's examples—it certainly eliminates Sierra Blanca as a functional equivalent of the border—for there are prob-

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[1] It would seem that only one road would suffice as well, if combined with the other relevant geographical features mentioned.

ably few points that geographically meet this standard. However, it seems to me that such a reading would prevent the creation of a "border zone" within which United States citizens, either living therein or passing through, are required to forfeit their Fourth Amendment rights.

Such a construction of a functional equivalent of the border setting would drastically reduce the government's ability to invoke the concept, and in light of the substantial entry of illegal aliens and contraband into the border area it is certainly one not often suggested. In an effort to accommodate the difficulties faced on the Texas/Mexico border, it appears we have focused on statistics rather than geography for determining functional equivalency. If we must reject a geographical construction of the concept, I would agree that the court's formulation of what is a functional equivalent represents a reasonable, but difficult, compromise.

Under the court's test functional equivalency turns "entirely on the nature of the traffic passing through the checkpoint." *See supra* part II, at 17. This standard is consistent with the *Almeida-Sanchez* examples since both empasize the fact that the vehicles, persons, or effects being subjected to a "border search" at a point not actually the border of the United States have recently crossed the border. Pursuant to the court's standard, the label "functional equivalent of the border" can be bestowed only when the government establishes that the traffic passing through the checkpoint is "international" in character and that this international traffic so predominates in the figures for the total traffic flow through the checkpoint that we are assured that "no more than a negligible

number of domestic travelers" are intercepted. *See supra* II at 17-18.

The above test for functional equivalency will of course turn now on those things that some consider most despicable—statistics.[2] Because the type and amount of traffic flowing through a particular point now become the keys to unlocking the functional equivalency label for that point, my hesitancy with the court's opinion arises because it leaves these two elements vaguely defined. Concededly, a specific definition of either element is not needed to invalidate the Sierra Blanca checkpoint as a functional equivalent of the border for it cannot meet any reasonable construction of these terms. But we are, I believe, attempting to enunciate a workable standard for what is proper government conduct away from the border so as to protect the integrity of the border, to give guidance to the government, and to protect the citizenry; accordingly, it seems logical that we should say what these terms mean.[3]

As for what is "international traffic," my reading of the court's opinion suggests we may be retreating from

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[2] Mark Twain, for example, is reported to have said when speaking about the evils of the world, "There are lies, damn lies, and then there are statistics."

[3] In footnote 4 of its opinion the court appears to recognize the importance statistics are to play in any future functional equivalency decision. The "well-crafted questions" it says are needed would seem to require us to tell future surveyors what should be the point of their questionaires. Without a clear definition of international traffic especially, we may either be condemning future survey efforts to irrelevance, like the survey conducted in these cases, or delegating to the surveyors the responsibility of defining our own terms. It seems to me we should bear the responsibility for our own words and what they mean.

the definition contained in *Alvarez-Gonzalez* II. In *Alvarez-Gonzalez* II we stated that "international traffic" for functional equivalency purposes encompasses both vehicles and persons that have actually crossed the border and vehicles and persons that have begun their travels in the United States but near the border. *See Alvarez-Gonzalez* II, 561 F.2d at 624. We reasoned that the latter traffic, although domestic in nature, should nevertheless be considered international in fact because these travels began in an area close to the border and because we found such trips often were a method for smuggling aliens or contraband into the United States. *Id.* The court recognizes that the *Alvarez-Gonzalez* II definition of international traffic encompasses truly domestic traffic by United States citizens, which it certainly does, and then suggests that "[b]y including domestic traffic in our definition of international traffic, our cases have perverted the limiting principle inherent in the border search exception." *Supra* part II, at 13-14. Such a statement would seem to reject at least in part the *Alvarez-Gonzalez* II definition of international traffic.

Thus, as I understand the court's opinion, the focus of the international traffic element is: has the person stopped at a checkpoint crossed the border and not been subject to inspection. *See also Alvarez-Gonzalez II*, 561 F.2d at 267-68 (Goldberg, J., dissenting). If the person stopped has crossed the border and not been subject to inspection, regardless of whether the means of transportation the person presently occupies also crossed the border, the person is to be considered international traffic. If the person stopped, however, has not crossed the border then such person is not to be considered international traffic even though his pres-

ent travel may have originated near the border; such a person then is properly designated domestic traffic. If my understanding of our definition of international traffic is correct, the government should structure questions in its future surveys accordingly. The focus should be on people and whether they have crossed the border without being subject to inspection.

My second concern centers on what "a negligible number of domestic travellers" means within the context of the majority's test. Negligible is certainly a definable term but it is one of those words whose meaning depends upon the point of view of the person defining it. Generally it means an amount considered insignificant or that can be ignored as unimportant. *See The Random House Dictionary of the English Language* 956 (1969). The difficulty with the application of "negligible" in our formula of course is that the government may consider a 30 to 40 percent interdiction of domestic traffic "negligible" in light of its interest in combatting illegal alien and contraband smuggling. We however as the author of the term and as the arbitor of constitutional principles should be the body responsible with giving the word a substantive meaning. With the same concerns of promulgating a workable standard that gives the government guidance and the citizenry protection, I think we should define negligible more precisely.

We have in the past said that 40% interdiction of domestic travel at the La Gloria checkpoint is permissible. *See Alvarez-Gonzalez II,* 561 F.2d at 623, 625. Prior to that we stated "anything approaching a majority percentage" of interdicted domestic traffic would be improper. *Alvarez-Gonzalez I,* 542 F.2d at 229. It would seem the court's "negligible" percentage standard goes back beyond even *Al-*

varez-Gonzalez I's threshold and certainly does not adhere to *Alvarez-Gonzalez II*'s notions about how much domestic travel may be stopped. In the end, however, and in the interest of a workable definition, we are destined to simply assign an actual numerical percentage to the term "negligible." By doing so the government thus would be spared the costs of setting up a checkpoint after a survey, having the checkpoint challenged, and then being told that the interdiction of 21 or 16, or whatever, percent of domestic travel as established in the survey is not negligible in our view. Concomitantly, if the government is told the minimum requirements necessary for a functional equivalent, the citizenry would not have to bear the burden of unconstitutional stops and searches that this after-the-fact evaluation process promotes.

The actual numerical percentage chosen while important is not as critical as the realization that sooner or later one must be selected. It seems to me we are in as good of a position as we will ever be to select what numerical amount of domestic traffic may be permissibly interdicted at a point designated the functional equivalent of the border. The percentage chosen of course will reflect how much we will compromise the fourth amendment rights of citizens in order to implement the functional equivalency concept.[4]

If my words convey nothing else they must be construed as expressing reluctance with the adoption of an unwieldy concept and our sometimes casual way of dealing with it.

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[4] Consonant with this view, I would suggest that the permissible percentage of domestic traffic interdiction would fall within a range of one to not more than ten percent. A number within this range would to me be consistent with the meaning of negligible.

Once functional equivalency becomes dependent upon statistical analyzes rather than a geographical setting, problems in addition to those addressed also arise, such as how long must a survey be conducted to determine the flow statistics, how long will a given survey be given effect, when should the survey be conducted, etc. While I may have more confidence in the science of statistics than others and may believe these problems and others can be managed, we are relegated to become more involved as statistical soothsayers than traditional judges in the area of functional equivalents of the border. This is a prospect I do not look forward to with any measure of comfort or assurance.

Nevertheless, agreeing that the Sierra Blanca checkpoint cannot be sustained as a functional equivalent of the border under any test, I concur in the court's withdrawal of that appellation.

B.

Since Sierra Blanca cannot be sustained as a functional equivalent of the border, I agree further with the court's opinion that we must look elsewhere in Fourth Amendment jurisprudence to see if the searches conducted in these cases can be considered constitutional. My search ends with the Supreme Court's opinions in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *United States v. Ortiz*, 422 U.S. 891 (1975), for in those cases the Court has defined the powers of the government at permanent checkpoints[5], such

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[5] In his able concurrence Chief Judge Clark would apparently abandon the use of all "labels" and adjudge all challenges on fourth amendment grounds with a "reasonableness" test. I do not believe, however, that labels and reasonableness are

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as Sierra Blanca, within this country. Under the teachings of these opinions the searches conducted in these cases were unconstitutional.

At permanent checkpoints the Supreme Court has stated that consonant with the Fourth Amendment the government may stop vehicles without suspicion, may question the persons inside the vehicle about their citizenship status, but that before any search of the persons or vehicle is undertaken the government officials must have either consent or probable cause to search. *See Martinez-Fuente* [sic], 428 U.S. at 567; *Ortiz,* 422 U.S. at 892. In

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mutually exclusive notions. Labels can embody the very balancing of public and private interests that Chief Judge Clark says should occur in determining reasonableness. Especially when the Supreme Court has addressed factual situations and legal arguments similar to the situation we now address as a federal appellate court, our honest invocation of the Court's label must embody the prior balancing performed by the Court itself.

Secondly, the Supreme Court has made labels important in this area of Fourth Amendment jurisprudence. Numerous classifications have been created, such as border searches, functional equivalent searches, extended border searches, permanent check points stops, and roving patrol searches. Each have their own requirements and each of them authorize different government actions. I feel therefore somewhat bound to utilize this general framework.

That is not to say however that a label cannot be misused or confusingly applied; our prior cases classifying Sierra Blanca as a functional equivalent of the border are examples of such applications. Nevertheless, if the substance of a label is understood and enunciated, I see nothing incogruous in applying it to a given situation as a sort of shorthand. The proper use of labels therefore can give appreciable guidance to government authorities as to how to obtain the given classification in another situation and what powers and restrictions go along with the label, while at the same time informing the citizenry of their civil rights.

these cases the government admits that searches, as that term is understood in the Fourth Amendment arena, occurred and it does not urge that the officers acted upon consent or probable cause in searching the defendants; accordingly, these searches were unconstitutional.

With this said I see no reason to join the court's extensive discussion on the possible viability and use of an "area warrant" in the Sierra Blanca locality. No area warrant has been issued in this case and I think the court speaks prematurely about the propriety of such warrants. To say the very least, the use of area warrants outside the narrow confines of administrative searches established by the Supreme Court raises the spectre of the general warrant of the pre-Revolutionary period. It is undisputed that the Fourth Amendment was specifically adopted in reaction to the Crown's use of general warrants. Therefore, I see no reason to place this court's imprimatur on such a practice until the government actually attempts to utilize such a device. Accordingly, I do not join in part IV of the court's opinion.

C.

Finally, I write briefly on the court's application of the good faith exception to the exclusionary rule in these cases. I agree with the court that the teachings of *Leon* and *Krull* apply to these cases, but I do so while sharing Judge Rubin's concerns expressed in his concurrence. Application of the exception makes sense to me in these cases because this court in its prior opinion specifically authorized the conduct undertaken by the Border Patrol officials, i.e., the search of persons and vehicles at Sierra Blanca without any suspicion. Thus in these cases we

stand in the shoes of the magistrate acting in *Leon* or the legislators involved in *Krull*. Outside of situations where we have authorized the specific conduct undertaken and then later declared it unconstitutional, I believe the analogy to *Leon* and *Krull* weakens and the exception should probably not be applied. Not to place such a limitation on the application of the exception would it seems to me transform the exception into the rule and would always deny to defendants the benefit of successfully litigating a Fourth Amendment claim when an officer claimed he was relying merely upon general caselaw in the Fourth Amendment area.

With these concerns and reservations, I concur in the affirmance of the defendants' convictions.

JONES, Circuit Judge, concurring specially:

I concur in Chief Judge Clark's reading of the applicable Supreme Court precedents and am thus persuaded that the Sierra Blanca checkpoint represents a novel location for analysis of the government's right to search vehicles for the purpose of enforcing our immigration laws. Unlike Judge Clark, however, I would urge the Court to authorize searches whose initial scope is confined to the problem tellingly documented by the government: illegal entry of aliens. See also 8 U.S.C. § 1357(a); 8 C.F.R. § 287.1(a)(2). It is unnecessary, ergo unreasonable, to address this problem by permitting at Sierra Blanca plenary searches of vehicles and private property contained therein. The proper constitutional balance, in my view, calls for an initial search of no more than major cavities of a vehicle and its contents that might contain aliens. Should the officers, in the course of interrogating

those who pass through the checkpoint or conducting this limited inspection, observe grounds that justify broader examination, we may deal with such cases as they arise. The behavior of the defendants and/or the condition of their vehicles in these cases, for instance, warranted such broader examination under accepted standards of fourth amendment reasonableness. See, e.g., California v. Carney, — U.S. —, 105 S.Ct. 2066 (1985); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); Carroll v. United States, 267 U.S. 132 (1925).